89-1184

No. _____

In The

Supreme Court of the United States

October Term, 1989

—o—

JEROME LACKE,
STANLEY KLEIN,
DAVID NIEMANN, and
DIANE KOHN,
Petitioners

vs.

CHERYLL GRAY, f/k/a CHERYLL LENGYEL,
Respondent

—o—

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

—o—

PETITION FOR WRIT OF CERTIORARI AND APPENDIX

—o—

CORPORATION COUNSEL FOR THE COUNTY OF DANE, WISCONSIN
Judith H. Toole
Deputy Corporation Counsel
210 Martin Luther King, Jr. Blvd.
Madison, WI 53709
(608) 266-4355

Counsel of Record for Petitioners

84 pp

QUESTIONS PRESENTED FOR REVIEW

1. Is the limitation period for actions brought pursuant to 42 U.S.C. Sec. 1983 in Wisconsin governed by Wisconsin's 3-year general personal injury statute of limitations for actions to recover damages for "injuries to the person", or by its 6-year statute of limitations for actions "to recover damages for an injury to the character or rights of another, not arising on contract, except where a different period is expressly prescribed"?

2. Is a civil rights plaintiff who has sued a municipality under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Sec. 2000e *et. seq.*, and 42 U.S.C. Sec. 1983, alleging both statutorily and constitutionally impermissible retaliatory motives for certain supervisory actions, and lost, precluded from subsequently suing the same supervisors, in their individual capacities, for the same actions, under alternative legal theories, when the acts alleged are alleged to have been acts performed within the scope of their employment for the municipality?

PARTIES TO THE PROCEEDINGS BELOW

All parties to the proceedings below are named in the caption of the case. Petitioners were officials and employes of the County of Dane, Sheriff's Department, in the State of Wisconsin and were named as Defendants, in both their official and individual capacities, in the District Court. They were the Appellees in the Court of Appeals. Respondent, a natural person, was the plaintiff in the District Court and Appellant in the Court of Appeals.

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REPORT OF DECISION UNDER REVIEW

The decision of the Court of Appeals is reported as *Gray vs. Lacke, et al.*, 885 F.2d 399 (7th Cir., 1989), and is set forth in the Appendix at 1A. The opinion of the District Court is reported at 698 F. Supp. 750 (W. D. Wis., 1988). Other record items and other relevant decisions connected with the case are also set forth in the Appendix.

STATEMENT OF GROUNDS FOR JURISDICTION

The Court of Appeals' decision presented for review was made on September 22, 1989. An order affirming in part, reversing in part and remanding the case was entered by the Court of Appeals on September 25, 1989. (A. at 42A). Petitioners timely filed a petition for rehearing with suggestion for rehearing *en banc*. Said petition was denied by order dated November 3, 1989. (A. at 41A).

This court has jurisdiction under 28 U.S.C. Sec. 1254(1).

RELEVANT STATUTORY AND CONSTITUTIONAL PROVISIONS

U.S. CONST. Amend. I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

42 U.S.C. § 1983 (1986)

Civil action for deprivation of rights. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .

WIS. STAT. § 893.53 (1987)

Action for injury to character or other rights. An action to recover damages for an injury to the character or rights of another, not arising on contract, shall be commenced within 6 years after the cause of the action accrues, except where a different period is expressly prescribed, or be barred.

WIS. STAT. § 893.54 (1987)

Injury to the person. The following actions shall be commenced within 3 years or be barred:

(1) An action to recover damages for injuries to the person.

(2) An action brought to recover damages for death caused by the wrongful act, neglect or default of another.

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PETITION FOR WRIT OF CERTIORARI

—o—

Petitioners Jerome Lacke, Stanley Klein, David Niemann, and Diane Kohn respectfully pray that a writ of certiorari issue to review the orders of the United States Court of Appeals for the Seventh Circuit entered on September 25, 1989, Petition for Rehearing Denied November 3, 1989, which reversed the judgment of dismissal of the United States District Court for the Western District of Wisconsin which had been entered in favor of petitioners and against the respondent Cheryll L. Gray.

STATEMENT OF THE CASE

This action was commenced on April 18, 1988 in the District Court for the Western District of Wisconsin. It purports to be an action brought pursuant to 42 U.S.C. Sec. 1983 alleging violations of various constitutional rights of the plaintiff — notably free speech rights as guaranteed by the First Amendment to the U.S. Constitution — by various acts of the four named defendants. For ease of reference, they will be referred to in this document as "the supervisors".

The supervisors were officials and employees of Dane County who, at one time or another over the course of several years, exercised some measure of supervisory authority over Ms. Gray's employment. The complaint alleges, in short, that all the supervisory decisions affecting Ms. Gray that any of the four supervisors made over a number of years were made for "retaliatory" motives, and that they therefore violated her constitutional right to free speech under the first amendment.

This is the second lawsuit Ms. Gray has filed making identical accusations. In 1987 she commenced a similar action, *sub nom*, *Gray vs. County of Dane*, alleging the same facts alleged in this action, but naming the County of Dane, as the only defendant. In the prior action she alleged both constitutional claims and claims brought under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Sec. 2000e *et seq.*, based on the very same acts of the very same supervisors named in the present complaint. The District Court had dismissed her constitutional claims on the grounds that she had failed to allege that the acts complained of were committed pursuant to a policy or custom of the county. Her Title VII claims, however, remained for trial.

About two weeks prior to the trial date, she attempted to amend her complaint to join the four individual supervisors named in this lawsuit. She was not permitted to do so. Shortly before the trial date on the Title VII claims, she stipulated to

dismissal of the Title VII claims, and subsequently took an appeal of the dismissal of the constitutional claims. The dismissal was affirmed by the 7th Circuit Court of Appeals in *Gray vs. County of Dane*, 854 F.2d 179, 1988. (A. at 43A).

While the initial appeal was pending before the 7th Circuit Court of Appeals, Ms. Gray filed the complaint in the present action, this time naming the four supervisors as parties defendant, in both their official and individual capacities. The defendants moved to dismiss, asserting that her claims were barred by the applicable statute of limitations, that she was precluded from pursuing the same claims against the individual supervisors by the principles of both *res judicata* and collateral estoppel, and that at any rate, the complaint failed to state a claim upon which relief could be granted.

The District Court granted the motion to dismiss, holding that the applicable limitations period was Wisconsin's three-year general personal injury statute, and that the allegations of the complaint that fell within that three-year period failed to state a claim upon which relief could be granted under 42 U.S.C. Sec. 1983. The District Court rejected the proposition that the plaintiff was precluded from pursuing the instant claims against the supervisors in their individual capacities, but agreed that she was precluded from bringing another action against them in their official capacities. Ms. Gray appealed.

On appeal, the 7th Circuit Court of Appeals reversed in part and affirmed in part, finding that (1) the applicable limitations period was six years; (2) that no principles of preclusion applied to bar the constitutional claims against the supervisors in their individual capacities, primarily because they were not in "privity" with Dane County for purposes of Sec. 1983 actions; and (3) that there were sufficient allegations in the complaint to constitute an arguable claim of possible First Amendment violations within that 6-year limitations period. Since the case was still at the pleading stage, it was remanded to the District Court

for further proceedings. The supervisors now seek review on the statute of limitations and preclusion questions.

The basis for federal jurisdiction in the district court in the first instance was 28 U.S.C. Sec. 1331 and 1343(a) (3) and (4).

ARGUMENT

I. THE COURT OF APPEALS HAS RENDERED A DECISION WHICH IS CONTRARY TO DECISIONS OF THIS COURT AND OF OTHER FEDERAL COURTS OF APPEALS ON THE APPLICATION OF THE PRINCIPLES ARTICULATED BY THIS COURT FOR DETERMINING THE APPROPRIATE STATE STATUTE OF LIMITATIONS TO APPLY IN ACTIONS UNDER 42 U.S.C. SEC. 1983.

A. This Court's Decisions in *Wilson v. Garcia* and *Owens v. Okure* Require Application of the Forum State's Personal Injury Statute of Limitations to Sec. 1983 Actions.

Before this Court decided *Wilson v. Garcia*, 471 U.S. 261, 85 L.Ed.2d 254, 105 S. Ct. 1938 (1985), the manner in which courts decided which statute of limitations period to apply to actions brought pursuant to 42 U.S.C. Sec. 1983 was haphazard, at best. Because Congress, in its wisdom, had seen fit not to provide a statute of limitations for such actions, federal courts were required to borrow the most appropriate state statute of limitations period. 42 U.S.C. Sec. 1988. The rule was, however, applied in a number of different ways. Using a case-by-case approach, most courts proceeded to compare the action before them with the most analogous state law cause of action and then pick the statute which applied to that action. In *Wilson*, supra, the Court rejected the case-by-case approach and held that federal courts should borrow only one state statute of limitations for all Sec. 1983 actions in a given state — the state's personal injury statute of limitations — and apply it uniformly regardless of the specific allegations of the complaint.

Before *Wilson*, supra, the 7th Circuit Court of Appeals had not expressly passed upon the question of which statute of limitations was the appropriate one to apply in Wisconsin. It had, however, suggested that six years was the appropriate period

without deciding which of the various six-year statutes was applicable, or why. See, *Steinle v. Warren*, 765 F.2d 95, 101 (7th Cir., 1985). Both Districts in Wisconsin, however, had reached similar results in holding that the "most analogous" state law cause of action in Wisconsin was "an action upon a liability created by statute, when a different limitation is not prescribed by law." *Kuecey v. Powers*, 79 F.R.D. 151, 152 (W.D. Wis., 1978) [citing WIS. STAT. Sec. 893.19(4) (1977); *Reese v. Milwaukee County Sheriff's Department*, 505 F. Supp. 88, 89 (E.D. Wis., 1980), citing WIS. STAT. Sec. 893.93(1)(a) (1979).

The *Wilson* Court rejected the tendency of courts to analogize Sec. 1983 causes of action with specific state law causes of action, reasoning that there is no perfect analogy between state law actions and the broad range of actions embraced by 42 U.S.C. Sec. 1983. The choice of the personal injury statute, it was hoped, would eliminate confusion and contribute to certainty for the litigants as well as the courts. It seemed a logical, sensible, and easily understood approach to a problem which had engendered much litigation.

The Wisconsin Court of Appeals, very shortly after *Wilson* was decided, thought so, too. In *Hanson v. Madison Service Corporation*, 125 Wis. 2d 138, 141 (Wis. App. 1985), the court looked to state statutes, found one for three years called "Injury to the person," WIS. STAT. Sec. 893.54, and applied it.

Contrary to all expectations, *Wilson* did not eliminate the confusion. It merely shifted the focus of the disputes from "most analogous state law cause of action" to "most analogous state law personal injury cause of action." This was because every state had a different way of organizing and categorizing its numerous statutes of limitations, and every state had more than one statute of limitations which, in one sense or another, could be characterized as covering different types of personal injury actions.

In Wisconsin, even though Wisconsin's Court of Appeals

had definitively decided the question in *Hanson*, at least one judge in the United States District Court for the Western District of Wisconsin disagreed. In *Saldivar v. Cadena*, 622 F. Supp. 949 (W.D. Wis. 1985), the court determined that, in *Wilson*, this Court had not really meant that federal courts should adopt the state's personal injury statute of limitations, but had meant that federal courts should choose the "most analogous" personal injury statute. Wisconsin had one which spoke of "injury to the character or rights of another." WIS. STAT. Sec. 893.53. Because the *Wilson* Court had spoken of Sec. 1983 actions as actions for injuries to personal rights, the District Court rejected the simple approach applied in *Hanson*, supra, and held that the appropriate statute of limitations to apply in Wisconsin was the 6-year limitation statute for "injuries to the character or rights of another." WIS. STAT. Sec. 893.53. Thus, the certainty which was fleetingly achieved by *Wilson* and *Hanson* disappeared in Wisconsin.

The dispute among the courts over which personal injury statute of limitations to choose came to a head in *Owens v. Okure*, 488 U.S. _____, 102 L.Ed.2d 504, 109 S. Ct. 573 (1989). There, the dispute was between the state's intentional tort statute and its general or residual one. The *Owens* Court, like *Wilson*, soundly rejected the "most analogous" approach, reiterating that Sec. 1983 actions are uniquely federal, and have come to embrace a number of claims that do not fit traditional common-law causes of action. The *Owens* Court reaffirmed the *Wilson* principle that the proper limitations period to apply is the state's personal injury limitations period. The Court rejected the choice of intentional tort statutes, and rejected also the proposition that courts should look to residual or catch-all statutes in the first instance. 102 L.Ed.2d, n.12 at 606.

Since *Owens*, litigants have continued to disagree over which state limitations period applies. This case poses a dichotomy between the statute which, by its own plain language, can only be characterized as the state's general personal injury statute, WIS. STAT. Sec. 893.54, and one of limited application

whose predecessor, WIS. STAT. Sec. 893.19(5). (1977) was characterized as a "residual tort" statute because it embraced some of the more esoteric common-law tort actions that do not have a specified limitation period. WIS. STAT. Sec. 893.53 (1979), *Segall v. Hurwitz*, 114 Wis. 2d 471, 339 N.W.2d 333 (Wis. App. 1983).[1]

The Seventh Circuit Court of Appeals' approach in this case is directly contrary to the court's admonition in *Owens*, supra, which directed courts to look to residual, or "catch-all" statutes "*only* where state law provides multiple statutes of limitations for personal injury actions and the residual one embraces, either explicitly or by judicial construction, unspecified personal injury actions." (emphasis added) 102 L.Ed.2d at 606, n.12. The Seventh Circuit resorted to Wisconsin's "catch-all" statute in the first instance, ignoring the fact that Wisconsin has one, and only one, general personal injury statute of limitations. WIS. STAT. Sec. 893.54. It has numerous other statutes governing specified intentional torts, and numerous exceptions for certain types of personal injury actions, see WIS. STAT. Secs. 893.55, .56, .57, .58, .585, .587, but only one which speaks generally of "injuries to the person". WIS. STAT. Sec. 893.54, therefore, is the appropriate statute of limitations to apply in Wisconsin under *Wilson* and *Owens*.

B. The Seventh Circuit's Approach To The Problem Of Choosing Which State Statute of Limitations To Apply In Sec. 1983 Actions in Wisconsin Is Inconsistent With That Adopted By Other Circuit Courts of Appeals.

Courts in the Sixth and Ninth Circuits, however, have applied the principles articulated in *Wilson* and *Owens* to reject the approach adopted by the Seventh Circuit in this case.

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[1] The statute under scrutiny in *Segall*, supra, WIS. STAT. 893.19(5) (1977) has since been divided into two separate statutes: WIS. STAT. Secs. 893.52 and 893.53 (1979).

The Sixth Circuit, in *Browning v. Pendleton*, 869 F.2d 989 (6th Cir. 1989), and *Emmons v. McLaughlin*, 874 F.2d 351 (6th Cir. 1989), held that Ohio's two-year bodily injury statute applied, instead of the one-year period previously applied. Before *Owens*, that court had held in *Mulligan v. Hazard*, 777 F.2d 340 (6th Cir. 1985) that a one-year period for certain enumerated intentional torts applied. The Ohio statute found to apply in those two cases was similar, though not identical to Wisconsin's three-year personal injury statute.[2]

The Ninth Circuit, also, has had occasion to apply *Owens* to cases arising in California. In *Del Percio v. Thornsley*, 877 F.2d 785 (9th Cir. 1989), a California statute covering "any injury or death of one caused by the wrongful act or neglect of another" was held to be the appropriate one to apply.[3]

Even the Seventh Circuit, in discussing which statute to apply in Illinois rejected the approach it has taken in this case. In *Herman v. City of Chicago*, 870 F.2d 400 (7th Cir. 1989) the court recognized the inappropriateness of attempting to analogize Sec. 1983 actions with state law causes of action, when it stated:

> *Wilson* recognized that many §1983 causes of action are not about "personal injuries," and that many seem to fit other statutes of limitations better. . . . The Court nonetheless applied the general period for personal injuries." 870 F.2d at 400.

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[2] OHIO REV. CODE §2305.10 governs "actions for bodily injury or injuring personal property." It was characterized in *Browning*, supra as a general statute which requires that actions for bodily injury be filed within two years after their accrual. 869 F.2d at 990.

[3] CAL. C. C. P. §340(3), the statute at issue in *Del Percio*, supra, governs "an action for libel, slander, assault, battery, false imprisonment, seduction of a person below the age of legal consent, or for injury to or for the death of one caused by the wrongful act or neglect of another."

Although none of the above cases are directly contrary to the decision in this case, they conflict with it in principle in that they recognize the basic holding of both *Wilson* and *Owens*, that it is the personal injury statute, and not some other more analogous one, that the court should look to for deciding which limitations period to apply.

C. The Choice of A Statute of Limited Application Is Inconsistent With Federal Interests.

To allow the Seventh Circuit's pronouncement on the appropriate statute of limitations in Wisconsin to stand would be inconsistent with federal interests. While, indeed, WIS. STAT. Sec. 893.53 is more favorable to potential plaintiffs than to defendants, *at this time*, the statute chosen by the Seventh Circuit has been, as recognized explicitly by that court, of very limited application over the years. See footnote 3, 885 F.2d at 408. (Appendix at 14A). State statutes of limitations are subject to change by state legislators. The *Wilson* Court recognized this when it stated:

> The characterization of all Sec. 1983 actions as involving claims for personal injuries minimizes the risk that the choice of a state statute of limitations would not fairly serve the federal interests vindicated by Sec. 1983. General personal injury actions, sounding in tort, constitute a major part of the total volume of civil litigation in state courts today and probably did so in 1871 when Sec. 1983 was enacted.

A state legislature, unsympathetic to federally-based causes of action, would undoubtedly be more willing to change such a statute, with an ulterior motive of shortening the limitations period for Sec. 1983 actions, without running any great risk of affecting a significant number of state law claims. This is especially so where, as here, the statute in question has been used in recent years almost exclusively in Sec. 1983 causes of action, at least in reported appellate opinions. Under such circum-

stances, cases governed by WIS. STAT. Sec. 893.53 can hardly be said to "constitute a major part of the total volume of civil litigation" in state court.

To borrow a statute of such limited application is both short-sighted and result-oriented. A principled application of this Court's direction to lower courts in *Wilson* and *Owens* requires that the general, more widely used personal injury statute be applied.

Because the Seventh Circuit's reasoning is in conflict with the principles set forth in both *Wilson* and *Owens*, and with other circuit courts' methodology in analogous situations in other states, and because its choice of statutes is inconsistent with federal interests in the long run, this court should grant review, reverse the Court of Appeals' decision, and reinstate the District Court's application of the three-year general personal injury statute rather than the six-year period governing injuries to character or rights.

II. THE COURT OF APPEALS HAS DECIDED THE QUESTION OF THE APPROPRIATE WISCONSIN STATUTE OF LIMITATIONS TO APPLY TO FEDERAL COURT ACTIONS BROUGHT PURSUANT TO 42 U.S.C. SEC. 1983 IN A WAY IN CONFLICT WITH A WISCONSIN COURT OF APPEALS DECISION ON THE SUBJECT MATTER.

A. The Wisconsin Court of Appeals Has Held That The Applicable Wisconsin Statute of Limitations in 42 U.S.C. Sec. 1983 Actions Is Three Years.

In *Hanson v. Madison Service Corporation*, 125 Wis. 2d 138, 141 (Wis. App. 1985), the Wisconsin Court of Appeals held that the limitations period applicable to Sec. 1983 cases in Wisconsin was Sec. 893.54(1), which establishes a three-year limitation for "an action for damages for injury to the person." This decision followed closely on the heels of this Court's decision in

Wilson v. Garcia, 471 U.S. 261, 85 L.Ed.2d 254, 105 S. Ct. 1938 (1985). The Wisconsin Supreme Court declined to review the decision. 125 Wis. 2d at 138.

Although the Wisconsin Court of Appeals is not, *per se*, the court of last resort in Wisconsin, its published decisions have statewide precedential effect. WIS. STAT. Sec. 752.41(2). Consequently, its decisions should be treated as if they were decisions of the state's court of last resort.

The Wisconsin Supreme Court, which is the state's court of last resort, has declined to rule expressly on the question of which state statute of limitations applies in Sec. 1983 actions, not only by denying review in *Hanson*, supra, but also by expressly refusing to reach the question in *Felder v. Casey*, 150 Wis. 2d 458, 441 N.W.2d 725 (Wis. 1989), on remand from _____ U.S. _____, 101 L.Ed.2d 123, 108 S. Ct. 2302 (1988).

B. The Court Of Appeals Has So Far Departed From The Accepted And Usual Course Of Judicial Proceedings, By Ignoring The Most Authoritative State Court Pronouncement On The Application Of State Statutes Of Limitations, As To Call For an Exercise Of This Court's Power Of Supervision.

The Seventh Circuit Court of Appeals correctly noted that the question of which statute of limitations to apply in actions brought under 42 U.S.C. Sec. 1983 is a question of federal law. 885 F.2d at 408–409, (Appendix at 15A). However, it incorrectly concluded, from that unassailable proposition, that it should ignore the controlling state court decision on the subject.

What the court failed to take into account is the equally unassailable proposition that the characterization of state statutes of limitations is a question of state law. Federal courts have no power to reject state courts' interpretations of state law. *Soderbeck v. Burnett County*, 821 F.2d 446 (7th Cir. 1987), see

also, *Smith v. Phillips*, 455 U.S. 209, 221, 71 L.Ed.2d 78, 102 S. Ct. 940 (1982).

The *Hanson* decision was rendered very shortly after *Wilson v. Garcia*. It clearly and unambiguously characterized Sec. 893.54 Wis. Stat. as Wisconsin's personal injury statute of limitations. Which state statute is the state's personal injury statute of limitations is unquestionably a question of state law. The only inquiry left for federal court resolution, once the state court has determined the meaning and application of state law, is whether application of that statute is or is not consistent with federal interests. 42 U.S.C. Sec. 1988.

The Seventh Circuit Court of Appeals, however, went beyond its authority, and rejected out of hand a plain, unambiguous and authoritative interpretation of state law, by a state court of competent jurisdiction. This is such a clear departure from the accepted and usual course of judicial proceedings as to call for this court's power of supervision.

III. THE COURT OF APPEALS HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS BY REFUSING TO APPLY WELL-ACCEPTED PRECLUSION PRINCIPLES, AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

The Seventh Circuit's refusal to apply either *res judicata* or collateral estoppel to bar the first amendment claims asserted against these parties is inconsistent with the basic purposes and principles of those doctrines. Both *res judicata* and collateral estoppel are doctrines based on fundamental fairness to litigants. As noted by that court in *Shaver v. F.W. Woolworth Co.*, 840 F.2d 1361, 1365 (7th Cir. 1988),

> [R]es judicata operates as a bar to the litigation of matters that could have been raised in a prior proceeding. This application of *res judicata* prevents splitting of a single cause

> of action and the use of several theories of recovery as the basis for separate suits . . . Hence the federal definition of a cause of action, when combined with the rule against claim-splitting, requires that a plaintiff allege in one proceeding all claims for relief arising out of a single core of operative facts or be precluded from pursuing those claims in the future.

The above principles have been repeatedly reaffirmed, not only by the Seventh Circuit, but also by other federal courts as a basis for barring multiple lawsuits based on the same set of facts. See, e.g. *Car Carriers, Inc. v. Ford Motor Co.*, 789 F.2d 589 (7th Cir., 1986) and *Hussein v. Oshkosh Motor Truck Co.*, 816 F.2d 348, 356 (7th Cir., 1987). *Bruszewski v. U.S.*, 181 F.2d 419 (3rd Cir., 1950), *cert. den.*, *Bruszewski v. U.S. War Shipping Administration*, 340 U.S. 865, 95 L.Ed.632, 71 S. Ct. 87 (1950), *Mertes v. Mertes*, 350 F. Supp. 472, affirmed, 411 U.S. 961, 36 L.Ed.2d 681, 93 S. Ct. 2141, (D. Del. 1972). *St. Louis Typographical Union No. 8, AFL-CIO v. Herald Co.*, 402 F.2d 553 (8th Cir., 1968).

Here, the Seventh Circuit's decision turns on a determination that *res judicata* only applies to prevent litigation against persons who were privies of the parties named in the first lawsuit. The decision relies on *Conner v. Reinhard*, 847 F.2d 384 (7th Cir. 1988) for the principle that officials sued in their individual capacities are not in privity with the government in Sec. 1983 cases. That position is not only inconsistent with the spirit and purpose of the doctrine of *res judicata*, it also fails to take into account a number of important considerations, unique to this case, in determining whether privity exists.

One consideration important in this case is that, in the prior action, the plaintiff asserted claims based on Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sec. 2000e *et seq.* as well as the various constitutional claims. See *Gray vs. County of Dane*, 854 F.2d 179 (7th Cir. 1988). Under Title VII, governmental agencies and their officials are in privity with one

another. Unlike Sec. 1983, Title VII imposes upon governmental employers not only *respondeat superior* liability for the acts of their employees, but also in some cases, strict liability, regardless of the knowledge, intent or even express policy of the policy-making body.

All the individual supervisors named in this action were, in fact, in privity with Dane County in the prior action because it contained a claim which was based on *respondeat superior* liability. Since this action is based on exactly the same set of operative facts as that one, *res judicata* should bar this suit.

The second important circumstance in this case is that all the acts asserted to have been committed by the supervisors were acts alleged to have been performed *within the scope of their employment.*

Wisconsin law mandates that when the government employees are sued solely for acts performed within the scope of their employment, it is the governmental entity that must pay. Sec. 895.46 Wis. Stat. It is illogical and unreasonable to conclude that any government employee is *not* in privity with the governmental employer when performing acts within the scope of his or her employment, when that employer is bound by state law to take responsibility for those acts, whether they are consistent with the employer's policies or not.

The real party in interest in this case is, therefore, Dane County — not the individual supervisors. The reality is that their presence in the lawsuit is nominal only. The mere fact that different defenses against the claims are available to the county as a corporate entity than would be available to the individual supervisors cannot change the fact that the plaintiff (Respondent) in this case is asserting the same facts, and the same claims of the same violations of the same rights as she asserted in her prior action.

Collateral estoppel is equally applicable to the circumstances of the case at bar, even though, under the circumstances of this case, the two doctrines overlap somewhat. The court's discussion fails to recognize the significance of the presence in the prior case of the Title VII action. The plaintiff clearly lost, by stipulating to dismissal with prejudice, her opportunity to litigate every *factual* issue upon which she now seeks to base her new claims. All acts alleged to have been committed by the defendants in this action were alleged to have been committed by them in the Title VII action. The First Amendment claim merely turns on a different legal theory of liability and a different conclusory allegation of impermissible motive for those same acts. By stipulating to dismissal of her Title VII claim "with prejudice" every factual issue that was necessary to recovery under Title VII was "actually litigated," and decided against her.

Even the Seventh Circuit has recognized, in *Shaver v. Woolworth*, supra, that the mere expedient of pleading a different legal theory of recovery, against nominally different defendants, under the same set of facts, cannot be used as a means of defeating application of preclusion principles, whether they are called "collateral estoppel" or *res judicata*, and so have numerous other federal courts. See, e.g., *Stuhl v. Tauro*, 476 F.2d 233 (1st Cir., 1973); *Parker v. State of Maryland*, 384 F.2d 873, *cert. den.*, 390 U.S. 982, 19 L.Ed.2d 1279, 88 S. Ct. 1103, *reh. den.*, 390 U.S. 1018, 20 L.Ed.2d 169, 88 S. Ct. 1268 and 393 U.S. 903, 21 L.Ed.2d 195, 89 S. Ct. 73, *reh. den.*, 397 U.S. 1003, 25 L.Ed.2d 415, 90 S. Ct. 1108, *reh. den.*, 404 U.S. 906, 30 L.Ed.2d 179, 92 S. Ct. 194 (4th Cir. 1967); *Cramer v. General Telephone and Electronics Corporation*, 582 F.2d 259 (3rd Cir., 1978); *Jackson v. Hayakawa*, 605 F.2d 1121, 1126, n.6 (9th Cir., 1979); *Alpert's Newspaper Delivery Inc. v. New York Times Co.*, 876 F.2d 266 (2nd Cir. 1989), *Davis Wright and Jones v. National Union Fire Insurance*, 709 F. Supp. 196 (W.D. Wash., 1989).

This court also has recognized the unfairness of permitting a litigant an opportunity to assert successive identical claims,

even against different parties. In *Montana v. U.S.*, 440 U.S. 147, 59 L.Ed.2d 210, 99 S. Ct. 970 (1979), the court held that the United States was estopped from relitigating an issue that had previously been decided by a state court, even though, technically, it had not been a party in the prior action. In *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 329, 28 L.Ed.2d 788, 799–800, 91 S. Ct. 1434 (1971) the Supreme Court was called upon to decide "whether it is any longer tenable to afford a litigant more than one full and fair opportunity for judicial resolution of the same issue." In its discussion, the Court pointed out that

> Permitting repeated litigation of the same issue as long as the supply of unrelated defendants holds out reflects either the aura of the gaming table or a lack of discipline and of disinterestedness on the part of the lower courts, hardly a worthy or wise basis for fashioning rules of procedure. Although neither judges, the parties, nor the adversary system performs perfectly in all cases, the requirement of determining whether the party against whom an estoppel is asserted had a full and fair opportunity to litigate is a most significant safeguard.

The court correctly noted that, because of the basis for the decision of the prior case on appeal, Gray did not have an opportunity to litigate the issue of "whether the acts complained of violated her first amendment rights," (A. at 11A). But that was purely a legal issue, based on an acceptance of the truth of all facts pleaded. It is not necessary, for preclusion principles to apply, that the court in the prior action to have actually ruled on all the substantive "merits" of the claim sought to be asserted in the second action. In *Angel v. Bullington*, 330 U.S. 183, 91 L.Ed.832, 67 S. Ct. 657, 661 (1947), this Court stated:

> It is a misconception of *res judicata* to assume that the doctrine does not come into operation if a court has not passed on the "merits" in the sense of the ultimate substantive issues of a litigation. An adjudication declining to reach such

ultimate substantive issues may bar a second attempt to reach them in another court . . .

In *Mertes v. Mertes*, 350 F. Supp. 475 (D. C. Del., 1972), aff'd, 411 U.S. 961, 36 L.Ed.2d 681, 93 S. Ct. 2141 (1972), it was recognized that *res judicata* may be asserted against a plaintiff in a subsequent action, if there is a close or significant relationship between successive defendants, and even where the specific issue was not actually decided by the court in the first case. This is especially true where the failure to assert the claims sought to be precluded was due solely to the plaintiff's choice.

The fact remains that Ms. Gray did have a full and fair opportunity, in her Title VII action, to litigate the factual issues of whether or not the acts complained of occurred at all, and if so whether they were justified by legally permissible motives. She also had a full and fair opportunity to join the individual supervisors as defendants, and failed to attempt to do so until it was too late. See *Gray v. County of Dane*, 854 F.2d at 182 (Appendix at XX).

Thus, because she had every opportunity to join her constitutional claims against these defendants to her prior Title VII action, and because she had every opportunity to litigate the factual basis for the claims she now asserts, both *res judicata* and collateral estoppel should apply to Ms. Gray's claims.

CONCLUSION

The holding that the appropriate statute of limitations to apply to Sec. 1983 cases in Wisconsin is its six-year statute governing injury to character or rights, rather than the general personal injury statute is inconsistent with both *Wilson* and *Owens*, supra, and cannot be reconciled with other circuit court decisions relating to similar statutes in states under their jurisdictions and may be inconsistent with Federal interests in the long run.

The Seventh Circuit's failure to apply preclusion rules to prevent successive litigation of the same claims against parties who are only nominally different is inconsistent with basic and well-established common-law principles. It encourages multiplicitous, vexatious and piecemeal litigation in derogation of the public policy of encouraging litigants to dispose of all related matters in one proceeding. This issue is important, not only to potential litigants, but to the courts. Judicial economy requires that the type of claim-splitting which occurred in this case not be allowed.

For these reasons, Petitioners contend that the Petition should be granted and that the matter should be set for briefing and oral argument.

Dated this 22nd day of January, 1990.

Respectfully submitted,

Judith H. Toole
Deputy Corporation Counsel
COUNTY OF DANE
210 Martin Luther King, Jr. Blvd.
Madison, Wisconsin 53709
(608) 266-4355

Counsel of Record for Petitioners

APPENDIX

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In the
United States Court of Appeals
For the Seventh Circuit

No. 88-3334

CHERYLL GRAY,
f/k/a/ CHERYLL LENGYEL,
Plaintiff-Appellant,

v.

JEROME LACKE, STANLEY KLEIN,
DAVID NIEMANN, and DIANE KOHN,
Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Wisconsin.
No. 88-C-329-S — **John C. Shabaz**, *Judge*.

ARGUED MAY 31, 1989 — DECIDED SEPTEMBER 22, 1989

Before CUMMINGS and COFFEY, *Circuit Judges*, and ESCHBACH, *Senior Circuit Judge*.

ESCHBACH, *Senior Circuit Judge*. The plaintiff-appellant, Cheryll Gray, brought this suit against Jerome Lacke, Stanley Klein, David Niemann, and Diane Kohn, the defendants-appellees, pursuant to 42 U.S.C. § 1983. In her complaint, she alleges that the appellees deprived her of her rights guaranteed by the first and fourteenth amendments to the Constitution. The appellees filed a motion to dismiss, which the district court granted. In dismissing her complaint, the district court ruled that Gray's claims either were barred by Wisconsin's three-year statute of limitations for personal injury or failed to state claims for relief.

On appeal, the appellant raises three primary issues. First, Gray contends that the district court erred in applying Wisconsin's three-year personal injury statute of limitations to her § 1983 claims. Second, she argues that she properly alleges claims for relief under § 1983 for deprivation of her equal protection and due process rights guaranteed by the fourteenth amendment. Finally, Gray claims that she was unlawfully retaliated against by the appellees for her speech and petitions for redress of grievances, which were protected by the first amendment because they touched upon matters of public concern.

In support of the district court's granting of their motion to dismiss, the appellees raise three other issues. They argue that Gray's claims are barred by res judicata and collateral estoppel. Additionally, they claim that Gray's action is barred because she did not timely serve them with the complaint under Wisconsin law. Finally, they contend that some of her claims are barred by a prior settlement agreement. For the reasons discussed below, we affirm in part, reverse in part, and remand for further proceedings.

I. Statement of Facts

Because Gray appeals from the district court's dismissal of her action, we accept all factual allegations contained in her complaint as true. *See Fontana v. Elrod*, 826 F.2d 729, 731 (7th Cir. 1987); *Redfield v. Continental Casualty Corp.*, 818 F.2d 596, 605–06 (7th Cir. 1987). Therefore, we recite the facts as Gray alleges them in her complaint.

On March 4, 1977, Gray began working as a communications operator with the Technical Services Division of the Dane County Sheriff Department. Gray, along with four other women, became the first group of women hired into nonclerical positions in the Technical Services Division. In July 1979, Gray and two other women who held the position of communications operator filed union grievances on the ground that they received

less money than male employees who had previously performed the same duties. Their supervisor, Sergeant Lawrence Larson, became angry with them for filing the grievances. He abused them verbally and threatened to have them dismissed.

In 1979, one of Gray's supervisors, Niemann, made sexual advances toward her during working hours. Niemann informed Gray that her chances for promotion and other employment benefits, which he controlled as manager-in-charge of technical services, depended upon her submission to his sexual advances. He further told Gray that communicator positions would soon be available and that he determined who would get those positions. Gray, however, steadfastly refused Niemann's sexual advances. Gray eventually applied for a position as a communicator. Although she was qualified for the job, she did not receive the promotion.

On February 4, 1980, Gray complained to Niemann and Kohn that one of Gray's supervisors had made submission to his sexual advances a prerequisite to employment benefits. Neither Niemann nor Kohn, however, investigated or addressed Gray's allegation. Instead, Niemann tried to cause Gray's termination from the Dane County Sheriff Department. Although Niemann was unsuccessful, he did cause her to receive a thirty-day suspension without pay for insubordination.

Later that same month, Gray filed a discrimination complaint against Dane County with the Dane County Affirmative Action Commission. Gray filed her complaint on behalf of herself and all other female communications operators. At least one other female communications operator filed a similar complaint. Six months later, Gray filed a sex-discrimination complaint with the State of Wisconsin. After filing her complaint with Wisconsin, a newspaper reporter from Madison interviewed Gray concerning her allegations of sex discrimination at the Dane County Sheriff Department. The newspaper carried an article which repeated her allegations and noted the various complaints and union grievances she had filed. Eventually,

Gray and Dane County settled the sex discrimination case that Gray had filed with the State of Wisconsin.

The settling of Gray's complaint did not end her employment woes. In November 1981, Gray applied for a position as an Income Maintenance Worker with Dane County. Although she was qualified for the job, Gray did not receive the position because her supervisors, including each of the appellees, gave negative references regarding her. Sometime between 1981 and 1983, however, Gray apparently changed jobs within the Dane County Sheriff Department and became a jail booking clerk.

On September 19, 1983, Gray voluntarily transferred to the Records Department of the Sheriff Department because Klein represented to her that the transfer would be for only six months and that she would receive valuable computer training. Contrary to Klein's representations, Gray was not allowed to work with computers in the Records Department, and her requests for computer training were denied. Instead, supervisor Kohn assigned Gray to duties which were beneath her job classification. Kohn watched Gray's work much more closely than other employees, held Gray to a higher standard of performance than Gray's coworkers, and meticulously kept track of Gray's activities in a file. Moreover, Kohn tried to turn Gray's coworkers against her by encouraging them to complain about Gray. A few months later, Gray filed a union grievance on behalf of herself and other jail booking clerks, all of whom were female, alleging that they were paid less than male employees who had previously performed the same duties. In her grievance, Gray requested that the jail booking clerks be reclassified and paid at a higher wage level. The parties eventually settled this grievance, and Gray and her coworkers became classified at a higher rate of pay.

After being in the Records Department for more than six months, Gray requested a transfer back to her position as a jail booking clerk. Although Klein had represented to her that her stint in the Records Department would last only six months,

each of the appellees, including Klein, participated in denying her requests to transfer. In November 1984, Gray again tried to leave the Records Department of the Dane County Sheriff Department. This time she applied for the position of paralegal with the Dane County District Attorney's Office. This position would have been a promotion for Gray, giving her an increase in salary and employment benefits. Although Gray was qualified for the job, she did not get it because the appellees provided negative references regarding her. Two months later, Gray again requested a transfer back to her position as a jail booking clerk. The appellees denied her request.

Starting in March 1985, the appellees altered Gray's work schedule in order to eliminate her work breaks and shorten her lunch period. In response, Gray filed yet another grievance concerning her working conditions. While her grievance was pending, Gray continued to have difficulty in getting along with her supervisors. The appellees reprimanded her both orally and in writing, and they selectively enforced work rules against her in an invidious manner. On one occasion, Kohn and Niemann questioned Gray about a conversation she had with a coworker the previous day. During their questioning, Kohn and Niemann spoke to Gray in an abusive and threatening manner. Their meeting ended only after Gray agreed, under protest, to provide a written statement describing the contents of her conversation with her coworker.

On May 14, 1985, Gray's grievance reached the Personnel Committee of the Dane County Board of Supervisors. The Personnel Committee recommended that Lacke reassign Gray so that she would not be supervised by Kohn and Niemann and would be performing tasks commensurate with her job level. Although Lacke was reluctant at first, he finally reassigned Gray back to her former position as a jail booking clerk. Upon reassignment, her direct supervisor was Klein, who immediately directed a sergeant to watch Gray's work and report back to him.

In June 1985, Gray applied for a position as an Administrative Services Supervisor I at the Dane County Hospital and Home. Although she was qualified for the job, she did not get this promotion because the appellees provided negative references about her. Later that month, Gray filed another sex-discrimination complaint with the State of Wisconsin. Her filing of a complaint, however, did not deter the appellees. Instead, they continued to harass her at work. Klein directed other supervisors to file written complaints about Gray, and Lacke had her sick-leave checked. Moreover, she was denied overtime work when she wanted it and was forced to work overtime when it was inconvenient for her.

On April 18, 1988, Gray filed this lawsuit in the district court, alleging that the appellees had deprived her of her rights guaranteed by the first and fourteenth amendments to the Constitution in violation of 42 U.S.C. § 1983.[1] She sued the appellees in both their individual and official capacities. The appellees moved to dismiss her complaint for the following reasons: (1) the complaint failed to state a claim for relief; (2) Gray's claims are barred by prior settlement agreements; (3) her claims are barred by res judicata and collateral estoppel; and (4) most of Gray's claims are barred by the applicable statute of limitations. The district court granted the motion to dismiss on various grounds. First, the court found that her suit against the appellees in their official capacities was barred by res judicata, although she could still maintain her suit against them in their individual capacities. Second, the district court found that Wisconsin's three-year statute of limitations for personal injury

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[1] 42 U.S.C. § 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

barred all claims arising from the appellees' acts taken prior to April 18, 1985. Finally, the court found that the rest of her action failed to state claims for relief under § 1983.

II. Res Judicata and Collateral Estoppel

The appellees argue that the principles of res judicata and collateral estoppel preclude Gray from maintaining this action. They contend that this action was already unsuccessfully litigated by her in a prior suit against Dane County. *See Gray v. County of Dane*, 854 F.2d 179 (7th Cir. 1988). In that suit, Gray sued Dane County under § 1983 and Title VII for sexual harassment, wage discrimination, and retaliation based on similar allegations to those contained in her complaint in this lawsuit. Because Gray failed to show that the alleged discrimination and retaliation she suffered was due to a policy or custom of Dane County, the district court dismissed her action for failure to state a claim. The district court also ruled that Gray had failed to show a deprivation of her equal protection or first amendment rights. Our court affirmed the district court solely on the basis that her complaint failed to show that the alleged discriminatory actions were done pursuant to a policy or custom of Dane County. *Id.* at 184. Our court expressly refused to decide whether she had adequately alleged deprivation of her rights guaranteed by the first and fourteenth amendments. *Id.* at 182.

A. Res Judicata

Under the doctrine of res judicata (claim preclusion), a final judgment on the merits of an action bars further claims by the parties or their privies based on that same action. *Montana v. United States*, 440 U.S. 147, 153, 99 S. Ct. 970, 973 (1979); *Beard v. O'Neal*, 728 F.2d 894, 896 (7th Cir.), *cert. denied*, 469 U.S. 825, 105 S. Ct. 104 (1984). Moreover, res judicata bars not only those issues that the parties actually litigated, but also any issue which the parties could have raised in the prior action. *Whitley v. Seibel*, 676 F.2d 245, 249 n.7 (7th Cir.), *cert. denied*, 459 U.S. 942, 103 S. Ct. 254 (1982); *Harper Plastics, Inc. v.*

AMOCO Chems. Corp., 657 F.2d 939, 945 (7th Cir. 1981). In order for res judicata to apply to this suit, the appellees must show the following three elements: (1) a final judgment on the merits in Gray's prior suit against Dane County; (2) an identity of the cause of action in her suit against Dane County and the present action; and (3) an identity of parties or their privies in Gray's prior suit and the instant action. *See Shaver v. F.W. Woolworth Co.*, 840 F.2d 1361, 1364 (7th Cir.), *cert. denied*, 109 S. Ct. 145 (1988); *Brown v. J.I. Case Co.*, 813 F.2d 848, 854 (7th Cir.), cert. denied, 108 S. Ct. 258 (1987).

Gray contends that the doctrine of res judicata is inapplicable to this lawsuit because the appellees are not privies of Dane County. Suits against employees in their official capacities are essentially suits against the government entities for which they work. *Monell v. Department of Social Servs.*, 436 U.S. 658, 690 n.55, 98 S. Ct. 2018, 2035 n.55 (1978); *Conner v. Reinhard*, 847 F.2d 384, 394 (7th Cir.), *cert. denied*, 109 S. Ct. 147 (1988). Therefore, in official-capacity suits, privity exists between government entities and their employees. *Beard*, 728 F.2d at 897; *Lee v. City of Peoria*, 685 F.2d 196, 199 n.4 (1982), and a plaintiff must show that the government employee was acting according to a policy or custom of the government entity, *Kentucky v. Graham*, 473 U.S. 159, 166, 105 S. Ct. 3099, 3105 (1985). Based on these principles, the doctrine of res judicata bars this lawsuit. Since our court determined in her prior suit against Dane County that Gray's supervisors were not acting according to a custom or policy of Dane County, *Gray*, 854 F.2d at 184, that case bars her current suit against the appellees in their official capacities.

Gray, however, has also sued the appellees in their individual capacities. *See* Plaintiff's Complaint, Rec. 2, ¶ 46, at 20. Thus, the issue remains whether the appellees in their individual capacities are privies of Dane County. The appellees argue that as employees of Dane County, they are necessarily its privies. This argument is without merit.

Our court has already resolved this identical issue in *Conner*, 847 F.2d at 384. In that case, Conner had originally brought suit against the City of Green Bay under § 1983, alleging that she was discharged in violation of her first amendment right to freedom of speech. The district court granted the City of Green Bay's motion for a directed verdict because Conner failed to show that her discharge was pursuant to a policy or custom of the City of Green Bay. *Id.* at 387. Conner then subsequently sued under § 1983 her supervisor and an alderman for the City of Green Bay in both their individual and official capacities for deprivation of her first amendment rights. The defendants filed a motion for summary judgment based on the doctrine of res judicata, which the district court denied. On appeal, the *Conner* court held that because Conner was suing the defendants in their personal capacities they were not "in privity with the City of Green Bay. Therefore, Conner's earlier suit against the city [did] not preclude her from pursuing [this] action." *Id.* at 396.

The facts before us closely mirror those before our court in *Conner*. Just as in *Conner*, Gray is suing the appellees in both their official and individual capacities. Additionally, in Gray's prior suit against Dane County, our court affirmed the district court's dismissal of her § 1983 action on the ground that she failed to show that her supervisors (the appellees in this suit) were acting pursuant to a policy or custom of Dane County. *Gray*, 854 F.2d at 184. Thus, to the extent that Gray is suing the appellees in their personal capacities, they are not in privity with Dane County. *See Conner*, 847 F.2d at 396; *see also Headley v. Bacon*, 828 F.2d 1272, 1279 (8th Cir. 1987) (holding that police officers were not in privity with the city with respect to claims made against them in their individual capacities). Moreover, because individual-capacity suits require only that plaintiffs show that the government employees were acting under color of state law, and not that they were acting according to a policy or custom of the government entity, *Kentucky*, 473 U.S. at 165–66, 105 S. Ct. at 3105, our court's prior decision that Gray's supervisors were not acting according to a custom or pol-

icy of Dane County does not preclude her current suit against her supervisors in their individual capacities.

B. Collateral Estoppel

The appellees also argue that the doctrine of collateral estoppel (issue preclusion) prevents Gray from maintaining this action. Under this doctrine, "once an issue is actually and necessarily decided by a court, that determination is conclusive in a subsequent suit on a different cause of action that involves a party to the earlier litigation." *Schellong v. U.S. Immigration & Naturalization Serv.*, 805 F.2d 655, 658 (7th Cir. 1986), *cert. denied*, 481 U.S. 1004, 107 S. Ct. 1624 (1987); *see Ferrell v. Pierce*, 785 F.2d 1372, 1384–85 (7th Cir. 1986). Collateral estoppel will prevent the relitigation of an issue when four requirements are met: (1) the party against whom collateral estoppel is asserted must have been fully represented in the prior litigation; (2) the issue sought to be precluded must be identical to an issue involved in the prior litigation; (3) the issue must have been actually litigated and decided on the merits in the prior litigation; and (4) the resolution of that issue must have been necessary to the court's judgment. *See Klingman v. Levinson*, 831 F.2d 1292, 1295 (7th Cir. 1987); *County of Cook v. Midcon Corp.*, 773 F.2d 892, 898 (7th Cir. 1985).

The crux of the dispute between the parties is whether Gray's claims based on the first and fourteenth amendments were actually litigated and decided on the merits in her prior suit against Dane County. Gray notes that although the district court decided those issues against her in her prior suit, our court expressly declined to reach those issues on appeal. Thus, under these circumstances, she contends that collateral estoppel is inappropriate. We agree.

The policy underlying collateral estoppel is that a party is entitled to only one fair opportunity to litigate an issue. *See Gilldorn Sav. Ass'n v. Commerce Sav. Ass'n*, 804 F.2d 390, 392 (7th Cir. 1987); *Bowen v. United States*, 570 F.2d 1311, 1322

(7th Cir. 1978). In furtherance of this policy, courts will not apply collateral estoppel when the party against whom the prior decision is invoked did not have a "full and fair opportunity to litigate" that issue in the prior case. *Allen v. McCurry*, 449 U.S. 90, 95, 101 S. Ct. 411, 415 (1980); *Teamsters Local 282 Pension Trust Fund v. Angelos*, 815 F.2d 452, 456 n.3 (7th Cir. 1987); *Miller Brewing Co. v. Jos. Schlitz Brewing Co.*, 605 F.2d 990, 992 (7th Cir. 1979), *cert. denied*, 444 U.S. 1102, 100 S. Ct. 1967 (1980). As our court has recognized on prior occasions, a "full and fair opportunity to litigate" includes the right to appeal an adverse decision. *See Disher v. Information Resources, Inc.* 873 F.2d 136, 139 (7th Cir. 1989) (noting that unless a judgment is appealable, collateral estoppel is inappropriate because the party "was denied an opportunity to contest it fully in the previous litigation"); *In re 949 Erie St., Racine, Wis.*, 824 F.2d 538, 541 (7th Cir. 1987) (noting that collateral estoppel does not apply to nonappealable interlocutory orders); *see also Standefer v. United States*, 447 U.S. 10, 23, 100 S. Ct. 1999, 2007 (1980) (noting that contemporary principles of collateral estoppel militate against giving preclusive effect to an acquittal because the government does not have a right to appeal an acquittal in a criminal case); *Block v. U.S. Int'l Trade Comm'n*, 777 F.2d 1568, 1571–72 (Fed. Cir. 1985) (ruling that collateral estoppel does not apply when "there has been no opportunity for appellate review").

In her prior action against Dane County, Gray tried to appeal the district court's ruling that the actions of which she complained did not violate her first or fourteenth amendment rights. Our court, however, affirmed the district court on other grounds and expressly declined to reach those issues. *See Gray*, 854 F.2d at 182 ("We uphold the district court's first ground for dismissing the complaint, making it unnecessary for us to consider whether Gray properly pleaded deprivations of the equal protection clause or the first amendment."). Therefore, for reasons beyond her control, Gray was not afforded a full and fair opportunity to litigate those issues. Accordingly, collateral es-

toppel does not apply to first and fourteenth amendment issues in the present action.

III. Statute of Limitations

Gray argues that the district court erred in applying Wisconsin's three-year personal injury statute of limitations to her § 1983 action. Instead, she contends that the district court should have applied Wisconsin's six-year personal rights statute. Moreover, Gray claims that even if the district court chose the correct statute of limitations, the district court erroneously applied that statute to her claims.

Although Congress created a federal action in § 1983, it did not specify a federal statute of limitations for such actions. *Anton v. Lehpamer*, 787 F.2d 1141, 1142 (7th Cir. 1986); *Mulligan v. Hazard*, 777 F.2d 340, 343 (6th Cir. 1985), *cert. denied*, 476 U.S. 1174, 106 S. Ct. 2902 (1986). Thus, courts have traditionally borrowed the most analogous state statute of limitations. *Anton*, 787 F.2d at 1142; *see Beard v. Robinson*, 563 F.2d 331, 334 (7th Cir. 1977), *cert. denied*, 438 U.S. 907, 98 S. Ct. 3125 (1978). This approach led to such inconsistent results in the federal courts, that the Supreme Court tried to give clearer guidance on which state statute of limitations to choose in *Wilson v. Garcia*, 471 U.S. 261, 105 S. Ct. 1938 (1985). In that case, the Court held that § 1983 claims can best be characterized as personal injury actions. *Id.* at 280, 105 S. Ct. at 1949. Therefore, the Supreme Court directed federal courts to apply a state's personal injury statute of limitations to § 1983 actions. *See id.* at 276–79, 105 S. Ct. at 1946–49.

In the case before us, *Wilson* does not settle this dispute because Wisconsin has two different statute of limitations for injuries to the person, and the parties disagree as to which one applies in § 1983 actions. The appellees argue that the district court correctly applied Wisconsin's three-year personal injury statute of limitations. This statute covers all actions to recover damages "for injuries to the person" and "for death caused by

the wrongful act, neglect or default of another." WIS. STAT. ANN. § 893.54 (West 1983). Conversely, Gray contends that the district court should have applied Wisconsin's six-year personal rights statute of limitations. This statute covers all actions to recover damages "for an injury to the character or rights of another, not arising under contract . . . except where a different period is expressly prescribed." *Id.* § 893.53.

In *Owens v. Okure*, 109 S. Ct. 573, 577 (1989), the Supreme Court, realizing that *Wilson* did not completely eliminate "the confusion over the appropriate limitations period for § 1983 claims," once again revisited this issue. The Court noted that although many states have more than one statute of limitations which apply to personal injuries, every state has only one general or residual statute of limitations governing personal injury actions. *Id.* at 578–80. Therefore, this general or residual personal injury statute of limitations would be readily ascertainable in every state and give greater predictability in applying limitation periods to § 1983 actions. *See id.* at 580. Accordingly, the Supreme Court held "that where state law provides multiple statutes of limitations for personal injury actions, courts considering § 1983 claims should borrow the general or residual statute for personal injury actions." *Id.* at 582.

Owens mandates that for § 1983 actions, we must choose the Wisconsin statute of limitations which is a general or residual statute for personal injury actions. Many factors support the conclusion that federal courts sitting in Wisconsin should apply Wisconsin's six-year personal rights statute of limitations to § 1983 actions. First, we note that the Wisconsin Appellate Court interpreted the predecessor statute to the present personal rights statute of limitations as a general or residual statute. In *Segall v. Hurwitz*, 114 Wis. 2d 471, 339 N.W.2d 333 (Wis. Ct. App. 1983), the plaintiff sued the defendant in part for interference with contractual relations. The *Segall* court noted that no specific statute of limitations applies in Wisconsin for injury from

contractual interference. The court then reasoned that the applicable statute of limitations was § 893.19(5) (the predecessor statute to the current § 893.53), which applied to actions to recover for an injury to the rights of another. *See id.* at 341. Thus, the *Segall* court interpreted § 893.19(5) as a residual or general personal injury statute of limitations. Because the language of § 893.19(5) is virtually identical to the language of its successor statute,[2] Wisconsin courts will probably continue to interpret the present six-year personal rights statute of limitations as a general or residual statute.[3]

Second, the language of the personal rights statute of limitations is consistent with that of a residual or general statute of limitations. This statute applies to an action for injury to the "rights of another." Thus, its language is broader than Wisconsin's other more specific statutes of limitations covering personal injuries. *See, e.g.*, WIS. STAT. ANN. § 893.54 (West 1983) (three-year limitations period on actions for personal injury and wrongful death); *id.* § 893.55 (either a one- or three-year limitations period on medical malpractice actions); *id.* § 893.57 (two-year limitations period on actions for intentional torts). The broad language of the personal rights statute of limitations is also consistent with the purpose of § 1983, which is to provide a remedy for a "wide spectrum of claims" that include more than

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[2] The language of § 893.19(5) provided in relevant part: "An action to recover damages . . . for an injury to the character or rights of another, not arising on contract, except in case where a different period is expressly prescribed." WIS. STAT. ANN. app. § 893, at 328 (West 1983).

[3] Our research has uncovered only three Wisconsin cases which even mention the personal rights statute of limitations. *See Felder v. Casey*, 441 N.W.2d 725, 729 (1989); *Esser Distrib. Co. v. Steidl*, 145 Wis. 2d 160, 426 N.W.2d 62 (Wis. Ct. App. 1988); *Segall*, 114 Wis. 2d at 471, 339 N.W.2d at 333. Unfortunately, none of these cases discuss its scope. In *Felder*, the Wisconsin Supreme Court expressly declined to resolve whether Wisconsin's three-year personal injury statute of limitations or its six-year personal rights statute of limitations applies to § 1983 actions. *Felder*, 441 N.W.2d at 729.

just bodily injury. *Owens*, 109 S. Ct. at 581. Indeed, "[h]ad the 42d Congress expressly focused on the issue decided today, we believe it would have characterized § 1983 as conferring a general remedy for *injuries to personal rights*." *Wilson*, 471 U.S. at 278; 105 S. Ct. at 1948 (emphasis added).

Finally, federal district courts in Wisconsin that have confronted this issue after the Supreme Court's opinion in *Wilson* have also applied the personal rights statute of limitations to § 1983 actions. For example, in *Saldivar v. Cadena*, 622 F. Supp. 949 (W.D. Wis. 1985), the plaintiff sued the defendant in part under § 1983 for racial and sexual harassment. The defendants moved to dismiss the complaint on the ground that it was barred by Wisconsin's three-year statute of limitations for personal injury. The *Saldivar* court reasoned that under *Wilson*, courts should choose a statute of limitations governing personal rights over bodily injury. *Id.* at 955. Accordingly, the *Saldivar* court held that Wisconsin's six-year statute of limitations for personal rights applied to § 1983 actions. *Id.* This determination was reaffirmed in two subsequent decisions. *See Jordi v. Sauk Prairie School Bd.*, 651 F. Supp. 1566, 1573 (W.D. Wis. 1987); *Thompson v. County of Rock*, 648 F. Supp. 861, 866 (W.D. Wis. 1986).

The appellees argue that we should apply Wisconsin's three-year personal injury statute of limitations to § 1983 claims because the Wisconsin Appellate Court had previously done so in *Hanson v. Madison Service Corp.*, 125 Wis. 2d 138, 370 N.W.2d 586, 588 (Wis. Ct. App. 1985). The appellees reliance on *Hanson* is misplaced. The characterization of a § 1983 action for statute of limitations purposes is an issue of federal law. *See Wilson*, 471 U.S. at 268–69, 105 S. Ct. at 1943. Thus, the decision by the Wisconsin Appellate Court is not binding on our court. Additionally, the *Hanson* court did not have the benefit of the Supreme Court's recent decision in *Owens* that further clarified which state statute of limitations should apply to § 1983 actions. Therefore, we decline to follow *Hanson*, and we hold that

Wisconsin's six-year personal rights statute of limitations applies to § 1983 actions.[4] Because Gray filed her complaint on April 18, 1988, she can maintain this § 1983 action based on any claims that occurred on or after April 18, 1982.[5]

IV. Timely Service of Process

The appellees also contend that Gray's claims are barred because she did not timely serve them with the complaint under Wisconsin law. They claim that under Wisconsin law, an action commences upon the filing of a complaint only if the plaintiff serves the defendants within sixty days of the filing of the com-

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[4] Because we hold that Wisconsin's six-year personal rights statute of limitations applies to § 1983 actions, it is unnecessary for us to reach the issue of whether to apply this decision retroactively. Under prior law, federal courts already applied a six-year statute of limitations to § 1983 actions in Wisconsin. *See Steinle v. Warren*, 765 F.2d 95, 101 (7th Cir. 1985); *Reese v. Milwaukee County Sheriff Dept.*, 505 F. Supp. 88, 89 (E.D. Wis. 1980); *Kuecey v. Powers*, 79 F.R.D. 151, 152 (W.D. Wis. 1978). Therefore, our decision does not change the length of the limitations period for § 1983 actions in Wisconsin.

[5] The appellees argue that some of Gray's claims are barred by a settlement agreement that the parties entered into on September 29, 1981, with respect to Gray's discrimination complaint filed with the State of Wisconsin. However, since the alleged discriminatory incidents forming the basis of Gray's complaint must have taken place before April 18, 1982, these claims are barred by the statute of limitations. Therefore, we need not decide whether they would be barred by the settlement agreement.

plaint. *See* WIS. STAT. ANN. § 893.02 (West 1983).[6] In this case, they note that although Gray filed her complaint on April 18, 1988, she did not serve them with the complaint until August 12, 1988. Thus, the appellees argue that her action did not commence on April 18, 1988, because she did not serve them with the complaint within the sixty-day period. We reject this argument.

A careful review of the record shows that the appellees did not present this argument to the district court. Their failure "to raise this issue in the district court results in a waiver of it on appeal." *United States v. Gaddis*, 877 F.2d 605, 613 (7th Cir. 1989); *see United States v. Muskovsky*, 863 F.2d 1319, 1323 (7th Cir. 1988), *cert. denied*, 109 S. Ct. 1345 (1989).

Furthermore, even if we were to reach the merits of this issue, we would still reject the appellees' argument. It is true that when federal courts borrow a state's statute of limitations for a § 1983 action, they also borrow the applicable tolling provisions. *See Wilson*, 471 U.S. at 269, 105 S. Ct. at 1943; *Cange v. Stotler & Co.*, 826 F.2d 581, 586 (7th Cir. 1987). Federal courts, however, "borrow only what is necessary to fill the gap left by Congress," *West v. Conrail*, 481 U.S. 35, 39 n.6, 107 S. Ct. 1538, 1542 n.6 (1987); *see Lewellen v. Morley*, 875 F.2d 118, 121 (7th Cir. 1989), and they will not borrow any state tolling rule that is inconsistent with federal law, *see Board of Regents v. Tomanio*, 446 U.S. 478, 485, 100 S. Ct. 1790, 1795 (1980).

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[6] Section 893.02 provides:

> An action is commenced, within the meaning of any provision of law which limits the time for the commencement of an action, as to each defendant, when the summons naming the defendant and the complaint are filed with the court, but no action shall be deemed commenced as to any defendant upon whom service of authenticated copies of the summons and complaint has not been made within 60 days after filing.

WIS. STAT. ANN. § 893.02 (West 1983).

Rule 3 of the Federal Rules of Civil Procedure provides that a "civil action is commenced by filing a complaint with the court." Rule 4(j) of the Federal Rules of Civil Procedure then gives the plaintiff 120 days to serve the defendant, unless good cause is shown, or else the action is dismissed. As our court has already held, "[i]n light of Rules 3 and 4(j) there is no deficiency of federal law on questions concerning the relation among filing, service, and the period of limitations." *Lewellen*, 875 F.2d at 121. Since there is no deficiency or gap in federal law, there is no reason for us to resort to Wisconsin's tolling rule, which requires service on the defendants within 60 days for an action to be commenced upon filing. *See Lewellen*, 875 F.2d at 120–21; *Del Raine v. Carlson*, 826 F.2d 698, 706 (7th Cir. 1987). Therefore, we find that Wisconsin's tolling rule does not apply to bar Gray's action, and because she served the defendants 116 days after filing her complaint, which is within the 120 day period set forth in Rule 4(j), her action commenced on the day she filed the complaint in the district court.

V. First Amendment Rights

Gray contends that the appellees deprived her of her first amendment rights to freedom of speech and to petition the government by retaliating against her for complaining about and filing grievances over sexual harassment and sex discrimination within the Dane County Sheriff Department. Thus, she claims that since these issues are matters of public concern, she has properly alleged a deprivation of her first amendment rights. Because of the myriad of different factual situations in which statements are made and grievances filed, there are no general standards by which we can judge all first amendment deprivation cases. *See Knapp v. Whitaker*, 757 F.2d 827, 840 (7th Cir.), *cert. denied*, 474 U.S. 803, 106 S. Ct. 36 (1985). Instead, we can enunciate only the general principles which guide our decision

and then apply those principles to the particular facts of each case.[*]

A. Freedom of Speech

An individual does not lose his first amendment right to freedom of speech because he is employed by the government. *Connick v. Myers*, 461 U.S. 138, 140, 103 S. Ct. 1684, 1686 (1983). A balance, however, must be made between the rights of a government employee to comment on matters of public concern and the right of the government, as an employer, to promote the efficiency of its public services. *Pickering v. Board of Educ.*, 391 U.S. 563, 566, 88 S. Ct. 1731, 1734–35 (1968); *Berg v. Hunter*, 854 F.2d 238, 241 (7th Cir. 1988), *cert. denied*, 109 S. Ct. 1314 (1989). Accordingly, in deciding whether the government has wrongfully deprived an employee of his right to freedom of speech, our initial inquiry is whether the employee was speaking on matters of public concern. *Rankin v.*

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[*] Since Gray filed her complaint on April 18, 1988, the six-year statute of limitations bars any claims based on actions taken by the appellees before April 18, 1982. Gray's complaint, however, contains factual allegations dating back to 1979 concerning acts of speech and filings of grievances that she made. Gray apparently contends that the appellees retaliated against her after April 18, 1982, for her earlier complaints about sexual harassment and filings of grievances. Therefore, she argues that she can still state a claim under § 1983 for deprivation of her rights based on her pre-April 18, 1982, verbal complaints and filings of grievances.

Since we are obligated to construe all facts in the light most favorable to Gray, we will consider all her alleged acts of speech and filings of grievances. However, Gray cannot continue to claim that each of the appellees' allegedly unlawful acts were committed in retaliation for all her instances of speech and filings of grievances. If we were to accept such a sweeping proposition, virtually no claims would ever be barred by a statute of limitations. Therefore, for those claims that we remand, the district court can judge for itself, based on further evidence, whether the appellees committed any unlawful acts during the limitations period because of Gray's activities that occurred before April 18, 1982.

McPherson, 483 U.S. 378, 384, 107 S. Ct. 2891, 2896–97 (1987); *Vukadinovich v. Bartels*, 853 F.2d 1387, 1390 (7th Cir. 1988). "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." *Connick*, 461 U.S. at 147–48, 103 S. Ct. at 1690; *see Hesse v. Board of Educ.*, 848 F.2d 748, 751 (7th Cir. 1988), *cert. denied*, 109 S. Ct. 1128 (1989).

In her complaint, Gray alleges three separate instances in which she engaged in speech: (1) when she complained to two of her supervisors that another supervisor had made submission to his sexual advances a term and condition of her employment; (2) when she gave an interview with a newspaper reporter; and (3) when she engaged in a private conversation with a coworker. Gray argues that because she engaged in her right to free speech, the appellees retaliated against her. Therefore, Gray claims that she has properly alleged a § 1983 action for deprivation of her right to freedom of speech.

In analyzing this issue, we must look at each act of speech separately to see whether it touched upon a matter of public concern. *See Connick*, 461 U.S. at 149, 103 S. Ct. at 1691 (finding that one question on a questionnaire touched upon a matter of public concern although the other questions did not); *Hesse*, 848 F.2d at 751 (reviewing all the plaintiff's expressions and finding that one of them relates to a matter of public concern). Gray's complaint to two of her supervisors about sexual harassment clearly touched upon matters of private concern. Although sexual harassment may inherently be a matter of public concern, *see Callaway v. Hafeman*, 832 F.2d 414, 417 (7th Cir. 1987), our court has repeatedly held that we must look to the point of the speech to see if the plaintiff addressed a matter of public or private concern, *see Vukadinovich*, 853 F.2d at 1390; *Linhart v. Glatfelter*, 771 F.2d 1004, 1010 (7th Cir. 1985). In this regard, Gray complained to her supervisors in order to have the sexual harassment stopped. Her communication related

solely to the resolution of a personal problem. *See Callaway*, 832 F.2d at 417. Therefore, this claim did not state an action under § 1983.

Sometime between February and August 1980, Gray gave an interview with a newspaper reporter which resulted in a published article that discussed Gray's allegations of sexual harassment within the Dane County Sheriff Department. Whether this speech is a matter of public or private concern is uncertain. The mere fact that a newspaper contacted her and published her allegations does not necessarily mean that this speech involved a matter of public concern. *See Vukadinovich*, 853 F.2d at 1391. Since the article reported on the grievances Gray had filed, it is quite possible that Gray was trying only to comment on her personal dispute with her supervisors. On the other hand, she may have been trying to notify the citizens of Dane County that there is a serious problem within the Sheriff Department. Since we must construe the complaint in the light most favorable to Gray, we assume that she was trying to comment on more than just her personal dispute. Thus, this speech does touch upon a matter of public concern, and the district court erred in dismissing this claim.[8]

Finally, Gray alleges that two of the appellees interrogated her concerning a private conversation she had with a coworker. Although it may have been a private conversation, the private nature of a statement does not "vitiate the status of the statement as addressing a matter of public concern." *Rankin*, 483 U.S. at 387 n.11, 107 S. Ct. at 2898 n.11. In her complaint, however, Gray makes no allegations concerning the content of that conversation. We have no way of knowing whether the conversa-

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[8] If on remand the district court finds, based on further evidence regarding the content, form, and context of the speech, that Gray was trying only to comment on her own personal dispute, then this claim should be dismissed. Additionally, Gray must also show that the appellees committed an unlawful act after April 18, 1982, in order to retaliate against her because of this newspaper article, or else this claim is barred by the statute of limitations.

tion touched upon a matter of public concern. Therefore, because Gray failed to make sufficient factual allegations regarding this incident, the district court properly dismissed this claim. *See Musso v. Suriano*, 586 F.2d 59, 62 (7th Cir. 1978) (affirming the dismissal of three different § 1983 actions because of insufficient allegations in the complaints), *cert denied*, 440 U.S. 971, 99 S. Ct. 1534 (1979).

B. The Right To Petition the Government

The first amendment guarantees every citizen's right "to petition the Government for a redress of grievances." U.S. CONST. amend I. The Supreme Court has stated that this right is "cut from the same cloth as the other guarantees of [the first amendment], and is an assurance of a particular freedom of expression." *McDonald v. Smith*, 472 U.S. 479, 482, 105 S. Ct. 2787, 2789 (1985). As an assurance of a particular freedom of expression, the right to petition the government is similar to the right to free speech. Accordingly, courts "analyze an alleged violation of the petition clause in the same manner as any other alleged violation of the right to engage in free speech." *Phares v. Gustafsson*, 856 F.2d 1003, 1009 (7th Cir. 1988); *see Belk v. Town of Minocqua*, 858 F.2d 1258, 1262 & n.5 (7th Cir. 1988); *Day v. South Park Indep. School Dist.*, 768 F.2d 696, 701 (5th Cir. 1985), *cert. denied*, 474 U.S. 1101, 106 S. Ct. 883 (1986). Therefore, in deciding whether a public employer has wrongfully deprived an employee of his right to petition the government, our inquiry must begin with whether the petition touched upon a matter of public concern by looking at the content, form, and context of the petition. *See Belk*, 858 F.2d at 1262; *Phares*, 856 F.2d at 1009.

In her complaint, Gray alleges six separate incidents in which she filed complaints and grievances with her union, Dane County, and the State of Wisconsin. She claims that the petition clause protected all these filings and that the appellees unlawfully retaliated against her due to these filings. Moreover, Gray contends that complaints about sex discrimination are never a

matter of private concern, and therefore, she has properly alleged a deprivation of her right to petition the government under § 1983.[9]

Three of Gray's petitions undoubtedly touched upon matters of private, not public, concern. The union grievance she filed in July 1979 concerned her desire to receive a higher rate of pay commensurate with the rate which male employees had received when they performed the same duties. She does not allege that she filed this grievance on behalf of all communications operators. Moreover, the fact that two other female communications operators filed similar grievances suggests that each filed on her own behalf. Additionally, Gray's grievance filed with Dane County in April 1985 concerned only her personal working conditions. Gray was dissatisfied with her job duties and work schedule and sought to have them changed. Finally, in her complaint filed with the State of Wisconsin in June 1985, Gray alleged only that "her employer had unlawfully discriminated against *her* in the conditions of *her* employment." Plaintiff's Complaint, Rec. 2, ¶ 40, at 16 (emphasis added). Clearly, the form and content of this complaint, as well as the other two, "indicate that these were purely matters of personal interest." *Phares*, 856 F.2d at 1009. Thus, the district court properly dismissed these claims.

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[9] The filing of grievances, which form the basis of Gray's petition-clause claims, could also be protected by her right to freedom of speech. *See Renfroe v. Kirkpatrick*, 722 F.2d 714, 715 (11th Cir.) (referring to the filing of a grievance as speech and applying a speech analysis), *cert. denied*, 469 U.S. 823, 105 S. Ct. 98 (1984). However, since the analysis for an alleged petition-clause deprivation is identical to that for free speech, our results would necessarily have to be the same.

Gray filed two additional complaints in 1980, one with Dane County and the other one with the State of Wisconsin. In the first complaint filed in late February, she alleged that she was subject to unlawful sex discrimination and sexual harassment. She also alleged unlawful disparate treatment in regard to her working conditions, such as sick leave and work assignments. She filed the complaint on behalf of herself and all other female communications operators and alleged that all female communications operators were being treated unlawfully because of their sex. Gray then filed a separate complaint in August with the State of Wisconsin, which merely repeated the allegations of her earlier complaint filed with Dane County.

Although the fact that Gray filed these complaints on behalf of all female communications operators is an indication of public, rather than private, concern, it certainly is not dispositive of this issue. Rather, we must consider whether the content, context, and form of these complaints, as revealed by the record as a whole, indicate that they were matters of public concern. *See Vukadinovich*, 853 F.2d at 1390; *Hess*, 848 F.2d at 751. Both the content and form of the complaints suggest that her primary concern was resolving a personal dispute that she was having with her employer. Her complaints apparently contained detailed allegations of discrimination and disparate treatment in regard to herself, but only vague and sweeping generalities concerning the unlawful treatment of the female communications operators as a group. Moreover, the timing and context of her complaints also suggest that they touched only upon matters of personal concern. In February 1980, before she filed her complaint with Dane County, Gray had complained to two of her supervisors about sexual harassment on the job and had received a thirty-day suspension without pay for insubordination. Thus, the timing of these complaints suggests that they were inextricably tied to her personal disputes with her supervisors, *see Berg*, 854 F.2d at 242 ("The timing and content of these charges [including sexual harassment] are tied inexorably to matters of only personal interest to Berg."), and a resolution of those personal disputes appears to be the reason why Gray filed the com-

plaints, *see Hesse*, 848 F.2d at 752 (stating that courts must look to the point of the speech). As our court has already noted, personal disputes "cloaked in the garb" of institutional grievances "are not thereby made matters of public concern." *Berg*, 854 F.2d at 242.

The disposition of her complaint filed with the State of Wisconsin also reinforces our conclusion that her complaints touched only upon matters of private concern. Gray alleges that

> [a state] investigator issued an initial determination finding probable cause to believe [*Gray*] had been discriminated against because of *her* sex and retaliated against because *she* had complained of sex discrimination by *her* employer. The investigator found probable cause to believe that [*Gray*] had been disciplined and supervised in a manner which discriminated against *her* on the basis of *her* sex and inretaliation [sic] for *her* filing a complaint of sex discrimination.

Plaintiff's Complaint, Rec. 2, ¶ 20, at 9 (emphasis added).

The investigator apparently made findings about Gray only and not about all female communications operators. Thus, her complaint filed with the State of Wisconsin, which merely realleged the allegations contained in her earlier complaint filed with Dane County, primarily concerned Gray and not the other female communications operators. Accordingly, the district court properly dismissed these claims because they touched only upon matters of personal concern.

Finally, in December 1983, Gray filed a union grievance, on behalf of herself and all other jail booking clerks (all of whom were female), alleging that they were being paid less than male employees who had previously performed the same duties. In her grievance, Gray sought to have the pay of all jail booking clerks reclassified at a higher level. This grievance was eventually settled, and all jail booking clerks were reclassified at a higher rate of pay.

This grievance definitely touched upon a matter of public concern. Unlike her other grievances, Gray was not trying to resolve a personal dispute. Rather, this was a criticism directed at the Sheriff Department in general, which makes it more of a matter of public concern. *See Hesse*, 848 F.2d at 752; *Egger v. Phillips*, 710 F.2d 292, 318 (7th Cir.), *cert. denied*, 464 U.S. 918, 104 S. Ct. 284 (1983). The issue she raised in her grievance affects not only herself, but all jail booking clerks because it touched upon the unequal pay rates between female and male employees. Additionally, it focused attention on an issue of concern to the citizens of Dane County since the compensation level affects the ability of Dane County to attract and retain qualified jail booking clerks. *See McKinley v. City of Eloy*, 705 F.2d 1110, 1114 (9th Cir. 1983). On prior occasions, courts have recognized that grievances submitted on behalf of other individuals often touch upon matters of public concern. *See Knapp*, 757 F.2d at 840–41; *McKinley*, 705 F.2d at 1114–15. Therefore, the district court erred in dismissing this claim.

VI. Equal Protection and Due Process Rights

Gray contends that the appellees deprived her of her equal protection and due process rights guaranteed by the fourteenth amendment. The appellees, however, argue that her allegations establish only a claim for Title VII relief, which was foreclosed by her earlier suit against Dane County. *See Gray*, 854 F.2d at 185 (affirming the district court's dismissal with prejudice of Gray's Title VII claim). The district dismissed these claims on the ground that Gray failed to state claims for relief under § 1983. We agree.

In order to maintain her equal protection claim, Gray must show that the appellees intentionally discriminated against her because of her membership in a particular class. *See Huebschen v. Department of Health & Social Servs.*, 716 F.2d 1167, 1171 (7th Cir. 1983); *Trigg v. Fort Wayne Community Schools*, 766 F.2d 299, 300 (7th Cir. 1985). Gray's complaint makes numerous allegations to the effect that the appellees

harassed and retailiated against her because she openly complained about and filed grievances over sexual harassment and sex discrimination within the Dane County Sheriff Department. These allegations, however, do not show that Gray has been discriminated against because she is a member of a particular class. The appellees allegedly retaliated against her because of her conduct, not because she is a woman.

Gray's right to be free from retaliation for protesting sexual harassment and sex discrimination is a right created by Title VII, not the equal protection clause. *See* 42 U.S.C. § 2000e-3. Section 1983 provides a remedy for deprivation of constitutional rights. It supplies no remedy for violations of rights created by Title VII. *See Alexander v. Chicago Park Dist.*, 773 F.2d 850, 855 (7th Cir. 1985), *cert. denied*, 475 U.S. 1095, 106 S. Ct. 1492 (1986); *Day v. Wayne County Bd. of Auditors*, 749 F.2d 1199, 1205 (6th Cir. 1984). Only when the underlying facts support both a Title VII and a constitutional deprivation claim can a plaintiff maintain an action under § 1983 and bypass the procedural requirements of Title VII. *See Ratliff v. City of Milwaukee*, 795 F.2d 612, 624 (7th Cir. 1986); *Trigg*, F.2d at 302.

Gray, however, contends that she has alleged an equal protection clause violation. She argues that the appellees discriminated against her because she is a member of a class of employees who stand up for their constitutional rights. This argument is without merit. First, we know of no court which has recognized this alleged class of individuals for purposes of the equal protection clause. Second, Gray's complaint alleges that the appellees retaliated against her for protesting alleged incidents of sexual harassment and sex discrimination, not because she tried to vindicate constitutional rights. Therefore, because Gray failed to establish a claim under the equal protection clause, the district court properly dismissed this claim.

Gray also argues that she was deprived of her due process rights. She presents no specific arguments, however, to support this claim. She fails to allege a property or liberty interest of

which the appellees deprived her. Therefore, she has not stated a claim under the due process clause. *See Ratliff*, 795, F.2d at 624 ("There was no error in dismissing plaintiff's due process claim because she did not have a protectable property interest . . . nor did the defendants invade any protectable liberty interest").

VII. Conclusion

In sum, we REVERSE the district court's dismissal of Gray's free speech claim based on her interview with a newspaper reporter. We also REVERSE its determination that she failed to state a claim under the petition clause based on her filing of a grievance on behalf of all jail booking clerks. Otherwise, we AFFIRM the judgment of the district court and REMAND this case for further proceedings.

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

CHERYLL GRAY, f/k/a/
Cheryll Lengyel,
Plaintiff,
v.
JEROME LACKE, STANLEY KLEIN,
DAVID NIEMANN and DIANE KOHN,
Defendants.

MEMORANDUM
AND ORDER
88-C-329-S

On April 18, 1988, the plaintiff Cheryll Gray filed her 42 U.S.C. § 1983 complaint against defendants Jerome Lacke, Stanley Klein, David Niemann and Diane Kohn alleging they violated her First and Fourteenth Amendment rights while she was employed by the Dane County Sheriff's Department.

On September 2, 1988, the defendants filed a motion to dismiss based on the following grounds: 1) the action is barred by the doctrine of *res judicata;* 2) the action is barred by the doctrine of *collateral estoppel;* 3) certain claims are barred by the statute of limitations; and 4) the complaint fails to state a claim upon which relief can be granted. Defendants also filed a motion for sanctions under Rule 11, Federal Rules of Civil Procedure. Plaintiff filed her brief in opposition to these motions on September 26, 1988, and defendants replied on October 6, 1988.

FACTS

For purposes of this motion the allegations in plaintiff's complaint must be taken as true.

Plaintiff began her employment with Dane County in 1974 and became a Communications Operator I on March 4, 1977.

In 1979 Captain David Niemann, plaintiff's supervisor, made sexual advances toward her which she rejected for which he denied her employment benefits and promotions. She was retaliated against because she complained about sexual discrimination in her employment in 1979 and 1980. In 1980 she was suspended for 30 days as a form of retaliation.

In August 1980 plaintiff was interviewed by a newspaper reporter about sexual discrimination in the Dane County Sheriff's Department. On September 29, 1981, plaintiff and her employer settled her sexual discrimination, sexual harassment and retaliation state claims before the Equal Rights Division (ERD).

In November 1981 plaintiff applied for a position as a Dane County Income Maintenance Worker and in November 1984 she applied for the position of paralegal assistant. She was not hired for either of these positions because her employers retaliated against her by providing false and inaccurate negative references. The defendants denied her training opportunities in 1984 and changed her work schedule in March 1985 in retaliation for her prior complaints against them.

On or about April 8, 1985 plaintiff filed a grievance alleging that defendants were unjustifiably and wrongfully harassing her in retaliation for filing a prior grievance. On May 14, 1985, the Personnel Committee recommended that she be reassigned, which she was on June 3, 1985.

In April 1985 defendants selectively applied and enforced work rules against her. On April 23, 1985, defendants Kohn and Niemann unjustifiably interrogated plaintiff in a loud, abusive and threatening manner. Plaintiff applied for a job as Administrative Services Supervisor I at the Dane County Hospital and Home in June 1985. She was not hired because defendants provided false and inaccurate negative employment references.

On June 18, 1985 plaintiff filed a charge of discrimination with the ERD, alleging that her employer had discriminated against her because of her sex and in retaliation for her prior actions. Defendants Lacke, Klein and Niemann met to conspire, plan and devise a strategy for initiating harassment and disparate treatment of plaintiff on June 28, 1985.

OPINION

Res Judicata

Defendant argues that plaintiff's claims are barred by the doctrine of *res judicata*. The doctrine of *res judicata* bars subsequent litigation of the same cause of action between the same parties or their privies. *Whitley v. Seibel*, 676 F.2d 245, 248, n.1 (7th Cir. 1982).

Plaintiff's prior legal proceeding in *Cheryll Gray, f/k/a/ Cheryll Lengyel v. County of Dane*, 854 F.2d 179 (7th Cir. 1988) concerned her causes of action against a different party, County of Dane. The question is whether the defendants in this action are privies of Dane County.

In *Beard v. O'Neal*, 728 F.2d 894, 897 (7th Cir. 1984), where employees of the FBI were sued in their individual capacities, the court held that they were not privies of another agent who was a defendant in a prior action for *res judicata* purposes. The court stated that if all the defendants had been sued only in their official capacities they would have been privies for the purpose of *res judicata* because the suits would have been against the government entity. *Monel v. New York City Department of Social Services*, 436 U.S. 658, 690 (1978).

In *Lee v. Peoria*, 685 F.2d 196, 199 (7th Cir. 1982), the Court has previously held that suits against government officials in their official capacities are equivalent to suits against the municipalities. Therefore, individuals sued in their official capacities are privies to a municipality, and a suit against them would

be barred by the doctrine of *res judicata* if a previous suit against the municipality had been decided on the merits.

In the present case the defendants are sued in both their individual and official capacities. The claims against them in their official capacities are claims against them as privies of the government entity, Dane County. These claims are barred by the doctrine of *res judicata* because they were previously decided on the merits in *Gray*, (1988). *See Gregory v. Chehi*, 843 F.2d 111, 120 (3rd Cir. 1988).

The suit against the defendants in their individual capacities questions whether they are privies of Dane County because of their employment relationship. Defendants argue that as employees of Dane County they are its privies. Their support for this contention is misleading.

Defendants refer to *Mandarino v. Pollard*, 718 F.2d 845, 850 (7th Cir. 1983) in which the court held that a government and its officers are in privity for purposes of *res judicata*. In that case the officers were village trustees, manager and mayor.

In this case the defendants, except for Lacke, are not county officers such as county board members. They are employed by the county. Defendant Lacke is sheriff for the county.

In *Lambert v. Conrad*, 536 F.2d 1183 (7th Cir. 1976), the court held that employees of a University Board of Regents sued in their individual capacities were privies of the Board where they acted in the scope of their employment. However, an employment relationship between individuals and a municipality has been since defined in *Monell*. The Court held that a municipality cannot be held liable for the actions of its employees based simply on an employment relationship. The municipality can only be held liable if the employees' actions were taken according to a policy, custom or practice of the municipality.

Employees sued in their individual capacities are privies of the government entity if they acted pursuant to its policy, custom or practice. In this case it has already been determined by the Court that the actions taken by the defendants were not pursuant to a policy, custom or practice of Dane County. Accordingly, the defendants in this action are not privies of Dane County.

Plaintiff's causes of action against these defendants in their individual capacities are not barred by the doctrine of *res judicata* and will not be dismissed. The causes of action against them in their official capacities are barred by *res judicata* and will be dismissed.

Defendants further argue that those claims are barred because plaintiff failed to amend her complaint in a timely fashion to add them in her original action. They argue that the claims against them could have been brought in the previous action and are, therefore, barred by the doctrine of *res judicata*. However, since the defendants in their individual capacities were not parties or privies in the first action, even though they could have been, the doctrine of *res judicata* does not bar any of these subsequent claims against them in their individual capacities. *See Whitley v. Seibel*, 676 F.2d at 248, n.1 (7th Cir. 1982).

Collateral Estoppel

Collateral estoppel applies to issue preclusion as distinct from claim preclusion. *See Allen v. McCurry*, 449 U.S. 90 (1980). This doctrine applies where: 1) there exists identity of issues; 2) the party against whom estoppel is sought had a full and fair opportunity to litigate the issues; 3) the issues were actually determined in the prior action; and 4) determination of the issues was necessary to the judgment in the prior action. *Whitley v. Seibel*, 676 F.2d 245 (7th Cir. 1982).

In the prior case *Gray* (1988), there is an identity of issues with this case. Plaintiff alleged that her First Amendment and Fourteenth Amendment equal protection rights were violated.

This Court dismissed these claims and also found that her injuries had not been caused pursuant to a policy, custom, or practice of the municipality. The Court of Appeals in affirming the district court's decision that there was no action pursuant to a municipal policy, custom, or practice did not expressly reach the First Amendment and Equal Protection issues.

According to *Standefer v. U.S.*, 447 U.S. 10 (1980), if the party who failed to prevail on a particular issue in the prior case was not able to obtain judicial review of that issue, collateral estoppel is inapplicable in a subsequent suit involving the same or different parties. In the present case plaintiff was not able to obtain judicial review of the dismissal of her First and Fourteenth Amendment equal protection claims and is therefore not collaterally estopped from pursuing these claims in this action.

Statute of Limitations

Defendants argue that many of plaintiff's claims should be barred because the applicable statute of limitations is three years. Plaintiff argues that the applicable statute of limitations is six years.

On April 17, 1985, the United States Supreme Court held that the correct statute of limitations for all § 1983 actions is the forum state's statute of limitations governing actions "for an injury to the person or reputation of any person," *Wilson v. Garcia*, 471 U.S. 261, 266 (1985). Wisconsin has one statute applicable to actions for injury to the person although Wis. Stat. § 893.53 is a six-year statute of limitations for an injury to character or rights. Wis. Stat. § 893.54 is the three-year statute of limitations for injuries to the person. According to *Anton v. Lehpamer*, 787 F.2d 1141 (7th Cir. 1986), "*Wilson* simply mandates that the same type of statute of limitations, the personal injury statute, will apply to all § 1983 actions," p. 1145. This Court has previously held that the three-year statute of limitations set forth in Wis. Stat. § 893.54 applies to § 1983 causes of action. The Wisconsin Court of Appeals has also held that the statute of limitations for § 1983 actions in state court is three

years. *Hanson v. Madison Service Corp.*, 125 Wis.2d 138, 141 (Ct App. 1985).

In *Felder v. Casey*, 108 S. Ct. 2302 (1983) the United States Supreme Court held that Wisconsin's Notice of Claim Statute could not be applied to § 1983 actions brought in state court. In a concurring opinion Justice White reiterated the holding in *Wilson v. Garcia* and noted in a footnote that the Wisconsin Supreme Court did not decide whether the § 1983 claim should be governed by the two-year statute of limitations applicable to intentional torts or the three-year statute of limitations applicable generally to "injuries to the person." 108 S. Ct. at 2315 n.2. This decision supports the conclusion that the three-year statute of limitations applied in *Hanson* is the appropriate statute for § 1983 actions in Wisconsin.

In *Anton* the Seventh Circuit Court of Appeals held that in Illinois, cases accruing before the date of the *Wilson* decision must be filed within the shorter period of two years from the *Wilson* decision or five years from accrual (the previous applicable period in Illinois). *See Loy v. Clamme*, 804 F.2d 405 (7th Cir. 1986).

This Court applied this analysis to *Yatvin v. Madison Metropolitan School District, et al.*, 840 F.2d 412 (7th Cir. 1988) to conclude that in Wisconsin § 1983 actions which accrued before the date of the *Wilson* decision must be filed within the shorter period of six years after accrual (the prior Wisconsin statute of limitations) or three years (the Wisconsin personal injury statute of limitations) after April 17, 1985, the date of *Wilson*.

Plaintiff argues that based on *Anton* and *Loy* she should have six years from the date of the last unlawful incident complained of or three years from the date of the *Wilson* decision, whichever is shorter. This Court agrees, but only for those acts occurring before *Wilson*. According to plaintiff's complaint the last unlawful incident occurred in June 1985, which was after the *Wilson* decision. Accordingly, plaintiff does not have a

choice of statutes for those actions occurring after *Wilson* for which she is bound by the three year statute of limitations. Plaintiff is only entitled to litigate the defendants' unlawful actions which occurred three years prior to April 18, 1988. Those actions occurring before *Wilson* are time barred.

This Court need not reach the defendants' argument that certain claims are barred by a 1981 settlement agreement since all claims arising from the defendants' actions prior to April 18, 1985 are barred by the three-year statute of limitations.

Constitutional Claims

The Court must next determine whether or not the defendants' alleged actions from April 18, 1985 to April 18, 1988 violated either/or her First Amendment or Fourteenth Amendment equal protection rights. The relevant actions of the defendants follow:

In April 1985 the defendants selectively applied and enforced certain work rules against plaintiff. Defendants Kohn and Niemann unjustifiably interrogated her on April 23, 1985. Defendants provided negative employment references for her in June 1985 and met to conspire, plan and devise a strategy for initiating harassment and disparate treatment of plaintiff.

These allegations do not support a claim that plaintiff was discriminated against because of her sex in violation of the Fourteenth Amendment Equal Protection Clause. Rather, the defendants' actions against plaintiff were because she filed a grievance that they had retaliated against her. Their actions were allegedly in retaliation for plaintiff's conduct and not because of her sex. The Court finds no class-based discrimination because plaintiff is complaining of retaliation. When the only wrongful act is retaliation, § 1983 can provide no remedy for the claim. *Alexander v. Chicago Park District*, 773 F.2d 850 (7th Cir. 1985); *Day v. Wayne County Board of Auditors*, 749 F.2d 1199 (6th Cir. 1984).

The Court notes that any Title VII claim based on these allegations has been foreclosed by the prior decision in *Gray v. County of Dane*, 854 F.2d 179 (7th Cir. 1988).

Plaintiff claims that her First Amendment rights were violated because the defendants retaliated against her for exercising her right to speak up and criticize her supervisors. From April 18, 1985 until April 18, 1988, the defendants' actions may have been related to two complaints filed by plaintiff. One complaint filed on April 8, 1985 was for retaliation against her and the other, filed on June 18, 1985, was for sex discrimination and retaliation.

The question is whether these two grievances addressed a matter of personal interest of public concern. In *Connick v. Myers*, 461 U.S. 138 (1983) the United States Supreme Court held that the right to free speech protected by the First Amendment is not violated by an employer who retaliates against a public employee for exercising that right, unless the employee's speech addressed a matter of public concern. Whether an employee's speech addresses a matter of public concern must be determined by the content, form and context of a given statement, as revealed by the record as a whole. *Id.* at 147–148. The motive of the employee for the speech cannot be dispositive when determining whether the speech is a matter of public concern. *See Belk v. Town of Minocqua*, No. 88-1131, 7th Circuit, September 27, 1988.

There is no evidence in the record that the grievance filed on April 8, 1985 concerned any employees other than plaintiff. It was filed specifically to object to defendants' retaliatory actions against her. There is nothing in the content, form or context of this grievance to suggest it was related to a matter of public concern.

On June 18, 1985, plaintiff filed a charge of discrimination with the ERD, alleging that her employer discriminated against her on the basis of sex and in retaliation. There is nothing in the

record to indicate the conduct upon which this charge is based or that the content, form or context of this grievance related to a matter of public concern. *See Callaway v. Hafeman*, 832 F.2d 414 (7th Cir. 1987).

Since there is nothing to indicate that plaintiff's grievances were related to speech that is a matter of public concern, they are not protected by the First Amendment. Any retaliatory actions by the defendants based on these grievances did not violate plaintiff's First Amendment rights.

Conclusion

Plaintiff's complaint must be dismissed because her claims which are not time barred do not address relief under the First or Fourteenth Amendments. Defendants' motion to dismiss will be granted.

Defendants have moved for attorneys fees pursuant to Rule 11, Federal Rules of Civil Procedure. The Court cannot find that plaintiff's claims were frivolous or were not brought in good faith. Therefore, defendants' motion for attorneys fees must be denied.

ORDER

IT IS ORDERED that defendants' motion to dismiss is GRANTED.

IT IS FURTHER ORDERED that defendants' motion for attorney fees is DENIED.

IT IS FURTHER ORDERED that judgment be entered in favor of the defendants and against the plaintiff, DISMISSING her complaint and all claims contained therein, with prejudice and costs.

Entered this 25th day of October, 1988.

BY THE COURT:

JOHN C. SHABAZ
District Judge

JUDGMENT IN A CIVIL CASE

United States District Court	DISTRICT Western District of Wisconsin
CASE TITLE Cheryll Gray, f/k/a Cheryll Lengyel, Plaintiff v. Jerome Lacke, et al., Defendants	DOCKET NUMBER 88-C-329-S NAME OF JUDGE OR MAGISTRATE John C. Shabaz

☐ **Jury Verdict.** This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action has come on for consideration by the Court with the judge named above presiding. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That judgment is entered in favor of the defendants and against the plaintiff, dismissing her complaint and all claims contained therein, with prejudice and costs.

CLERK	DATE
(BY) DEPUTY CLERK	OCT. 27, 1988

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

November 3, 1989.

Before
Hon. Walter J. Cummings, Circuit Judge
Hon. John L. Coffey, Circuit Judge
Hon. Jesse E. Eschbach, Sr. Circuit Judge

CHERYLL GRAY,
f/k/a CHERYLL LENGYEL,
Plaintiff-Appellant,
No. 88-3334 v.
JEROME LACKE, STANLEY KLEIN, DAVID NIEMANN, *AND DIANE KOHN*,
Defendants-Appellees.

Appeal from the United States District Court for the Western District of Wisconsin.
No. 88-C-329-S
John C. Shabaz, *Judge*

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by defendants-appellees, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

JUDGMENT — ORAL ARGUMENT IW

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

SEPTEMBER 25, 1989.

Before
Hon. Walter J. Cummings, Circuit Judge
Hon. John L. Coffey, Circuit Judge
Hon. Jesse E. Eschbach, Sr. Circuit Judge

CHERYLL GRAY,
f/k/a CHERYLL LENGYEL,
Plaintiff-Appellant,
No. 88-3334 vs.
JEROME LACKE, STANLEY KLEIN, DAVID NIEMANN, AND DIANE KOHN,
Defendants-Appellees.

Appeal from the United States District Court for the Western District of Wisconsin,
No. 88-C-329-S
John C. Shabaz, Judge

This cause was heard on the record from the United States District Court for the Western District of Wisconsin, Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, REVERSED AND REMANDED, in accordance with the opinion of this Court filed this date. Each party to bear their own costs.

Cheryll GRAY, f/k/a Cheryll Lengyel,
Plaintiff-Appellant,

v.

COUNTY OF DANE,
Defendant-Appellee.

No. 87-2770.

United States Court of Appeals,
Seventh Circuit.

Argued March 28, 1988.

Decided July 28, 1988.

854 F.2d 179 (7th Cir. 1988)

Cheryll Gray sued Dane County, Wisconsin, under section 1983[1] and Title VII[2] for sexual harassment, wage discrimination and workplace retaliation against her for protesting against the County's employment practices. The district court dismissed the section 1983 count of Gray's complaint for failure to state a claim upon which relief could be granted. The Title VII count was later dismissed with prejudice pursuant to a stipulation by the parties. Gray appeals from the dismissal of her section 1983 claim and also contests the district court's refusal, prior to the stipulation of the parties, to dismiss the Title VII count without prejudice. We affirm the dismissal and decline on mootness grounds to assess the refusal to dismiss the Title VII claim without prejudice.

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[1] Section 1 of the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1982), as amended, provides in part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State or Territory . . ., subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

[2] *See* Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e et seq. (1982).

I.

For purposes of reviewing the dismissal of the section 1983 claim, we summarize the facts as they appear in Gray's complaint. In March 1977, Gray, who had been working for the County since 1974, was hired for the position of Communication Officer I in the Dane County Sheriff's Department. She and four co-workers who started at roughly the same time were the first five women to hold nonclerical positions in the Department. Thereafter ensued a protracted series of disputes between Gray and her supervisors over sexual harassment and discrimination at the Sheriff's Department and over on-the-job retaliation against Gray for protesting these conditions.

Soon after Gray began her new job, a supervisor solicited sexual favors from her, promising employment advantages in return. Gray complained to other supervisors both about the supervisor who had propositioned her and about co-workers whom Gray suspected of having accepted the bargain. Complaint ¶ 10. Gray also became aware of wage discrimination in the Sheriff's Department. In July 1979, Gray and two female co-workers filed union grievances alleging that the Sheriff's Department was discriminating against women Communications Operators by paying them less than the men who had formerly held those same jobs. *Id.* ¶ 11. Six months later, Gray renewed her sexual harassment charge in a complaint to the Dane County Affirmative Action Committee, adding charges that her supervisors had singled her out for unfavorable treatment in retaliation for her earlier protests. She alleged that her supervisors penalized her through adverse shift assignments and unjustified opposition to requests for sick leave and vacation time. *Id.* ¶¶ 12, 20–21. The complaint does not disclose the results of these early efforts to halt the discrimination and retaliation at the Sheriff's Department.

In August 1980, Gray filed complaints with the Equal Rights Division of the Wisconsin Department of Industry, Labor and Human Resources (the "ERD") and the Federal Equal

Employment Opportunity Commission. Five months later, an ERD investigator determined that probable cause existed to support Gray's claims of discrimination and retaliation. Gray and the County settled the ERD claim in September 1981, and the case was dismissed.

Two years later, Gray, who had apparently changed jobs within the Sheriff's Department, encountered a second instance of wage discrimination. She filed a grievance with the County alleging that she and the other jail booking clerks, an all-female group at the time, were being paid less than the men who had previously performed the same duties. In December 1984, this dispute was settled, when the County agreed to a retroactive increase in the pay grades of the booking clerks. *Id.* ¶ 16.

Finally, in April 1985, Gray "filed a grievance with defendant alleging that defendant had unfavorably changed her schedule, reprimanded her, and shortened her lunch hour . . . in retaliation for her [1983] grievance." This grievance reached the personnel committee of the Dane County Board of Supervisors. The committee, according to the complaint, first "recommended," then "pressure[d]" the Sheriff to reassign Gray to another supervisor and a job more appropriate to her qualifications. *Id.* ¶ 17. Gray broadly asserts that her supervisors discriminatory and retaliatory actions were undertaken "with the knowledge and ratification of . . . the sheriff and chief deputy" and "the express or tacit approval of . . . members of defendant's board of supervisors." *Id.* ¶¶ 23–24. However, the complaint is devoid of specific factual allegations that support this claim.

Gray filed her complaint in the district court on January 23, 1987. The County counterclaimed, asserting that Gray's district court action constituted an actionable violation of the September 1981 settlement of Gray's ERD complaint, which provided in part that Gray would not use events described in her ERD complaint as the basis for a later action. In April 1987, the district judge dismissed Gray's section 1983 count for failure to

state a claim. *See* Fed.R.Civ.P. 12(b)(6). The district judge declined to dismiss the Title VII count, however, finding that the complaint had made out a Title VII claim by alleging that the County had punished her for her complaints about sexual harassment and wage discrimination.

The dismissal of only the section 1983 count left Gray in an awkward position. The remedies authorized by Title VII include "reinstatement or hiring . . ., with or without back pay . . ., or any other equitable relief as the court deems appropriate." 42 U.S.C. § 2000e-5(g) (1982). This court has held that "other equitable relief" does not include compensatory damages for injuries unconnected to discharges in violation of Title VII or nominal damages which plaintiffs might seek as a form of public vindication or as a basis for the award of attorneys' fees. *Hale v. Marsh*, 808 F.2d 616, 620 (7th Cir. 1986); *Bohen v. City of East Chicago*, 799 F.2d 1180, 1183–84 (7th Cir. 1986). Gray therefore faced the prospect of a full-blown trial on the Title VII count for what her attorney believed would be, at most, a minimal recovery. (In light of *Bohen*, this assessment probably *overestimated* the dollar value of Gray's Title VII claim.)[3] After delaying for five months following dismissal of her section 1983 claim until only three weeks before the scheduled trial date, Gray moved to dismiss the Title VII count without prejudice and to amend the complaint to add individual defendants under the section 1983 count. At the pretrial conference, held on the day when this motion was filed, the district judge summarily rejected Gray's request to join individual defendants for the appeal of a claim that had already been dismissed; he also ruled that the Title VII count would only be dismissed at such a late date on terms amenable to the County Tr. at 5–6 (Sept. 18,

[3] *Bohen* affirmed the rejection of an entire Title VII claim based upon a finding that the plaintiff had been fired for cause and therefore had no back pay remedy. The decision expressly ruled out awards of nominal damages to plaintiffs who remained employed. 799 F.2d at 1184. This suggests that the County could have obtained summary judgment on the Title VII count simply by establishing that Gray never left the County's employ.

1987). On September 30, 1987, the district judge entered an order formally denying the motion to amend and, pursuant to a stipulation of the parties, dismissing the Title VII claim with prejudice and the county's counterclaim without prejudice.[4]

II.

The April 23, 1987 order recited two justifications for dismissing the section 1983 count of Gray's complaint under rule 12(b)(6). First, the judge found that Gray had failed to allege that the discrimination and retaliation that she experienced were attributable to a policy or custom of Dane County, rather than to the unauthorized actions of particular officials. He also found that the alleged actions of county employees did not violate the equal protection clause, since Gray's complaint dealt principally with retaliation based on conduct rather than discrimination based on membership in a protected class, or based on the first amendment (as incorporated by the fourteenth amendment), since the complaint described efforts by Gray to vindicate personal rights rather than to speak out on matters of broad public concern. We uphold the district court's first ground for dismissing the complaint, making it unnecessary for us to consider whether Gray properly pleaded deprivations of the equal protection clause or the first amendment.

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[4] We do not believe that the district court, by dismissing the counterclaim without prejudice, retained control over this case and deprived this court of jurisdiction under 28 U.S.C. section 1291. Claims dismissed without prejudice are not unappealable per se. *United States v. Wallace & Tiernan Co.*, 336 U.S. 793, 794 n. 1, 69 S. Ct. 824, 825 n. 1, 93 L.Ed. 1042 (1949). This court regards dismissals without prejudice as unappealable interlocutory orders "only when lower courts, either expressly or by implication, retain jurisdiction over the disputes to permit complainants to save by amendment otherwise deficient pleadings." *In re Ohio River Co. v. Carrillo*, 754 F.2d 236, 238 (7th Cir. 1985). Here, there is no indication that the district court intended to retain jurisdiction. The clear purpose behind the stipulation dismissing the counterclaim without prejudice and the Title VII claim with prejudice was to end the proceeding in the district court and to permit immediate appeal of the section 1983 dismissal.

The system of notice pleading embodied in the federal rules of civil procedure does not favor dismissals for failure to state a claim. *See Conley v. Gibson*, 355 U.S. 41, 45–46, 78 S. Ct. 99, 101–02, 2 L.Ed.2d 80 (1957). Despite their liberality on pleading matters, however, the federal rules still require that a complaint allege facts that, if proven, would provide an adequate basis for each claim. *Rodgers v. Lincoln Towing Serv., Inc.*, 771 F.2d 194, 198 (7th Cir. 1985); *Strauss v. City of Chicago*, 760 F.2d 765, 767 (7th Cir. 1985); *Sutliff, Inc. v. Donovan Cos.*, 727 F.2d 648, 654 (7th Cir. 1985). In ruling on motions to dismiss, courts must presume that all facts fairly alleged in the complaint are true. The courts are not obliged, however, to ignore any facts set forth in the complaint that undermine the plaintiff's claim or to assign any weight to unsupported conclusions of law. *See American Nurses' Ass'n v. Illinois*, 783 F.2d 716, 724 (7th Cir. 1986); *Vilter Mfg. Co. v. Loring*, 136 F.2d 466, 468 (7th Cir. 1943). *See generally* 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1363 at 658–59 (1969).

The principle that municipalities may only be held liable for constitutional violations arising under formal policies or well-established customs derives from *Monell v. Department of Social Services*, 436 U.S. 658, 98 S. Ct. 2018, 56 L.Ed.2d 611 (1978). *Monell* found that section 1983 imposes liability on municipalities for deprivations pursuant to official policy or entrenched practices, but bars liability for actions that can be tied to municipalities only under a *respondeat superior* theory. *Id.* at 691–94, 98 S. Ct. at 2036–38; *see Pembaur v. City of Cincinnati*, 475 U.S. 469, 478, 106 S. Ct. 1292, 1297–98, 89 L.Ed.2d 452 (1986).

This limitation on municipal liability has required the courts to determine whether particular actions by municipal employees, undertaken without formal authorization, can implicate the municipality by establishing the existence of an entrenched practice with the effective force of a formal policy. *Monell*, 436 U.S. at 691, 98 S. Ct. at 2036; *Wolf-Lillie v. Sonquist*, 699 F.2d 864, 870 (7th Cir. 1983). The court has held

that "the isolated, intentional acts of an officer [without authority to set municipal policy] do not establish municipal liability under Section 1983," *Rodgers*, 771 F.2d at 202,[5] and has repeatedly affirmed dismissals of section 1983 claims that seek to impose municipal liability based on such isolated acts. *See Henry v. Farmer City State Bank*, 808 F.2d 1228, 1237 (7th Cir. 1986); *Strauss*, 760 F.2d at 767–68; *see also City of Oklahoma City v. Tuttle*, 471 U.S. 808, 821, 105 S. Ct. 2427, 2435, 85 L.Ed.2d 791 (1985) (plurality opinion), *id.* at 830–31 (Brennan, J., concurring). However, "where the plaintiff alleges a pattern or a series of incidents of unconstitutional conduct, . . . the courts have found an allegation of policy sufficient to withstand a dismissal motion." *Powe v. City of Chicago*, 664 F.2d 639, 650 (7th Cir. 1981); *see Hossman v. Blunk*, 784 F.2d 793, 797 (7th Cir. 1987) (per curiam).[6]

Gray's complaint alleges more than a single instance of unconstitutional conduct. Although Gray's allegations pertain pri-

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[5] An unconstitutional policy can be inferred, however, from a single decision or act by an official or body responsible for setting policy. *See, e.g., Owen v. City of Independence*, 445 U.S. 622, 100 S. Ct. 1398, 63 L.Ed.2d 673 (1980); *Malak v. Associated Physicians, Inc.*, 784 F.2d 277, 283–84 (7th Cir. 1986).

[6] *See also Kasper v. Board of Election Comm'rs*, 814 F.2d 332, 343–44 (7th Cir. 1987) (Board's knowing toleration of vote fraud by its agents would constitute de facto policy); *Bohen*, 799 F.2d at 1189 (plaintiff shows custom or practice of sexual harassment by demonstrating participation of "high-ranking, supervisory, and management officials responsible for working conditions"); *Wolf-Lillie*, 699 F.2d at 870 ("pervasive pattern of executing invalid writs of restitution" sufficient to create municipal liability).

marily to actions taken against her personally, she also refers to discrimination against other female employees.[7] Moreover, Gray's personal claims span a period of six years and include specific allegations of two instances of sexual harassment, wage discrimination in two different positions and numerous forms of on-the-job retaliation for her complaints about these incidents.[8]

If this were a full account of Gray's complaint, these allegations would be sufficient under *Hossman* and *Powe* to state a claim of constitutional violations pursuant to a municipal practice or custom. But Gray's complaint does not stop with these allegations. It also describes Gray's use of the County's internal grievance procedures and the County's significant efforts to address Gray's complaints. The complaint states that on December 27, 1983, Gray "filed a grievance with defendant alleging that she and other jail booking clerks, who were all women, were being improperly paid less than had the male employees who had performed the same duties previously." Complaint ¶ 16. In response to this grievance, the County placed female jail clerks in a higher job classification, effective from the date the grievance was filed. *Id.* On April 8, 1987, the complaint alleges, Gray filed another grievance with the County alleging on-the-job retaliation for her equal pay complaint. *Id.* ¶ 17. This grievance reached the personnel committee of the County's Board of Supervisors, which overrode the sheriff's opposition to Gray's

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[7] *See* Complaint ¶ 11 ("sexually degrading" remarks directed to three women who filed equal pay complaint); *id.* ¶¶ 16–17 (women jail booking clerks paid less than men who previously held jobs).

[8] *See* Complaint ¶¶ 10–11, 16–17, 20–21.

claim and directed that Gray be reassigned so that she could work under a different supervisor and perform duties appropriate to her employment grade. *Id.*[9]

The existence of workable review procedures at the County level, procedures from which Gray plainly derived some measure of satisfaction, undermines her claim that there was a custom or practice of discrimination and retaliation so well-established as to embody unwritten municipal policy. By the complaint's own terms, the unconstitutional conduct of officials in the Sheriff's Department was repeatedly undercut, first by the County's settlement of an equal pay claim and later by a directive that the Sheriff redress Gray's harassment and retaliation complaints by transferring her to another supervisor and job slot. The offending officials clearly were not conforming to informal practices " 'so permanent and well settled as to constitute a "custom or usage" with the force of law.' " *City of St. Louis v. Praprotnik*, — U.S. —, 108 S. Ct. 915, 926, 99 L.Ed.2d 107 (1988) (plurality opinion) (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 167–68, 90 S. Ct. 1598, 1613–14, 26

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[9] According to the complaint, Gray had sought redress through her union, the Dane County Affirmative Action Committee and the ERD. Complaint ¶¶ 11–12, 13. The complaint does not indicate what came of the first two of these efforts (though a weak inference against the pervasive practice Gray must show might be drawn from the existence of a Dane County Affirmative Action Committee whose functions included processing claims such as Gray's). The proceeding before the ERD produced, according to Gray, "an initial determination finding that probable cause existed to believe plaintiff had been discriminated against because of her sex and retaliated against" because of her complaints. *Id.* ¶ 14. Soon thereafter the County settled the claim on terms amenable to Gray.

L.Ed.2d 142 (1970)); *id.* 108 S. Ct. at 931 (Brennan, J., concurring) (same).[10] Reading the complaint liberally, we may assume that the County's grievance procedures were too slow and too lenient toward wrongdoers to prevent every violation of employees' constitutional rights by supervisors. But the question is not whether the system was perfect, but whether it could be said to have fostered the violations described in the complaint. Given the high degree of culpability that must be shown to establish municipal liability for acquiescence in employees' wrongdoing, *Jones v. City of Chicago*, 787 F.2d 200, 204–05 (7th Cir. 1986); *Lenard v. Argento*, 699 F.2d 874, 885 (7th Cir.), *cert. denied*, 464 U.S. 815, 104 S. Ct. 69, 78 L.Ed.2d 84 (1983), the allegations of municipal misconduct contained in the complaint fall short of the mark.

[1] The complaint as a whole suggests at most a custom or practice within the Sheriff's Department of harassment, discrimination and retaliation within the gaps created by imperfect enforcement of contrary policies. We do not rule out the possibility that a section 1983 plaintiff in some future case might show that a municipality's formal procedures for redressing grievances served only to disguise entrenched practices of violating employees' rights. Gray's complaint, however, alleges no facts in support of such a claim against Dane County. Viewed in its entirety, the complaint alleges constitutional violations by in-

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[10] The grievance mechanisms identified in Gray's complaint distinguish this case from *Bohen*, where "[c]omplaints by the victims of sexual harassment were addressed superficially, if at all, and the department had no policy against sexual harassment." 799 F.2d at 1189. *Compare also Iskander v. Village of Forest Park*, 690 F.2d 126, 129 (7th Cir. 1982) (evidence that police department customarily strip searched suspects in front of window facing a corridor creates triable issue of municipal liability); *Powe*, 664 F.2d at 649–51 (complaint's allegations of repeated arrests under erroneous warrant permit inference that official municipal procedures are deficient).

dividual supervisory employees, but it fails to allege that these violations took place under a policy or established practice.[11]

III.

[2] Gray's final argument, that the district judge abused his discretion when he refused to dismiss the Title VII claim without prejudice, requires little discussion. Gray argues that dismissal without prejudice should have been granted because this disposition would have terminated the Title VII claim as finally as would have dismissal with prejudice. Title VII allows plaintiffs only ninety days in which to bring suit following the receipt of a right to sue letter. 42 U.S.C. § 2000e-5(f)(1) (1982). Gray received a right to sue letter on or before June 15, 1987, and was therefore time-barred from filing a new Title VII claim by the time she filed her motion to dismiss on September 15, 1987. There may be potential differences in the collateral consequences of dismissals with and without prejudice that are unrelated to the viability of the Title VII claim; but Gray has represented that none of these ramifications is relevant here. During the September 28, 1987 hearing on Gray's motion to dismiss without prejudice Gray's counsel stated: "I don't see how there could be any prejudice to defendants and I could only see that the efficiencies of justice and the Court and the parties would be promoted by such a dismissal." Tr. at 4 (Sept. 18, 1987). In her submissions to this court Gray again suggests that the two forms of dismissal are functionally equivalent in the circumstances of this case. Moreover, on September 28, 1987, Gray

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[11] These actions by the County are also inconsistent with any claim that the Sheriff's Department housed a "decisionmaker possess[ing] final authority to establish municipal policy with respect to the action ordered." *Pembaur*, 475 U.S. at 481, 106 S. Ct. at 1299 (plurality opinion); *see id.* at 486, 106 S. Ct. at 1301–02 (White, J., concurring); *see also Praprotnik*, 108 S. Ct. at 926 (plurality opinion) ("When an official's discretionary decisions are constrained by policies not of that official's making, those policies, rather than the subordinate's departures from them, are the act of the municipality.").

filed a superseding motion with the district court *requesting* dismissal with prejudice in the event that the district court declined to dismiss without prejudice. In view of Gray's repeated assertions that dismissals with or without prejudice are functionally equivalent in the present circumstances, the district court's refusal to dismiss without prejudice is unreviewable based on "the familiar proposition that 'federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them.' " *DeFunis v. Odegaard*, 416 U.S. 312, 316, 94 S. Ct. 1704, 1705, 40 L.Ed.2d 164 (1974) (quoting *North Carolina v. Rice*, 404 U.S. 244, 246, 92 S. Ct. 402, 404, 30 L.Ed.2d 413 (1971)).

IV.

Gray elected to bring her section 1983 claim against the County alone despite clear indications, described in the complaint itself, that the County employees who violated her rights were flouting County policy rather than following well-established custom. When the dismissal of the section 1983 count revealed that this litigation strategy was ill-conceived, Gray waited until the eve of trial on the remaining Title VII count to propose an amendment to the complaint in an effort to join individual defendants on appeal who had not been heard in the district court. If the allegations of the complaint are correct, Gray may well have had a viable cause of action against some of her superiors as individuals. Her likely inability to obtain a hearing on these claims as matters now stand is not, however, attributable to any error by the district court.

The district court's refusal to dismiss the Title VII count without prejudice, requested by Gray in the same eleventh-hour motion, seems an unlikely target for a charge of abuse of discretion. The district judge's handling of the Title VII claim is not reviewable, however, since Gray's own representations render this issue moot.

AFFIRMED.